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TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1937

No. 367

ERIE RAILROAD COMPANY, PETITIONER,

vs.

HARRY J. TOMPKINS

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITION FOR CERTIORARI FILED AUGUST 30, 1937.

CERTIORARI GRANTED OCTOBER 11, 1937.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1937

No. 367

ERIE RAILROAD COMPANY, PETITIONER,

vs.

HARRY J. TOMPKINS

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

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JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., NOVEMBER 22, 1937

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[fol. 3] IN UNITED STATES DISTRICT COURT, SOUTHERN DISTRICT OF NEW YORK

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HARRY J. TOMPKINS

against

ERIE RAILROAD CO. (a New York Corporation),

SUMMONS

To the above-named Defendant:

You are hereby summoned to answer the complaint in this action, and to serve a copy of your answer, or, if the complaint is not served with this summons, to serve a notice of appearance on the plaintiff's attorney within twenty days after the service of this summons, exclusive of the day of service. In case of your failure to appear or answer, judgment will be taken against you by default for the relief demanded in the complaint.

Witness, the Honorable John C. Knox, Judge of the District Court of the United States for the Southern District of New York, at the City of New York, this 29th day of August A. D. 1934.

Charles Weiser, Clerk.

Bernard G. Nemeroff, Plaintiff's Attorney, Office and Post Office Address, 11 Broadway, Borough of Manhattan, City of New York.

[fol. 4] IN UNITED STATES DISTRICT COURT

[Title omitted]

COMPLAINT

Plaintiff, by his attorney Bernard G. Nemeroff, complains of the defendant and alleges as follows:

First. That this plaintiff is a citizen of the State of Pennsylvania and resides at 1125 Wyoming Avenue, Exeter, Pa.

Second. That at the times hereinafter mentioned, the defendant was and still is a domestic corporation, duly organized and existing under the laws of the State of New York and operating a steam railroad both in the State of New York and in the State of Pennsylvania, and that said corporation has its principal place of business in the Borough of Manhattan, City, County and State of New York.

Third. That on or about the 24th day of July, 1934, plaintiff was lawfully on a foot path near the intersection formed by Rock Street and a railroad track exclusively maintained by the defendant corporation in the Borough of Hughes- [fol. 5] town, City of Pittston, Luzerne County, Pennsylvania, and which said foot path runs parallel with and adjacent to said railroad track and said foot path furthermore has been for a long time prior to the said date herein used by the public as a means of egress and ingress to and from the streets abutting to and intersecting the said railroad track maintained by the said defendant, and that said use was with the full knowledge, consent and acquiescence of said defendant, and the proximity of said foot path to the said railroad tracks was fully known to the said defendant, its servants, agents, employees and others.

Fourth. That as plaintiff was on said foot path, the defendant, negligently, carelessly and recklessly and without heed to the safety of the public, ran one of its trains on said railroad track at a high and dangerous rate of speed and negligently, carelessly and recklessly omitted, while so operating said railroad train, and although approaching a crossing, to give any signal by ringing of the bell or blowing of the whistle of the locomotive of said railroad train, or otherwise, although defendant had no gates or any flag-men at said crossing, by reason whereof plaintiff was unaware of the approach of the said locomotive, and that said defendant carelessly, recklessly and negligently permitted an object to project from the said train, which was operated by said defendant.

Fifth. That by reason of the defendant's said negligence and without any fault or negligence on the part of the plaintiff, said plaintiff was struck with great force, hurled to the ground and underneath the wheels of said railroad train and thereby inflicting upon him serious injuries.

[fol. 6] Sixth. That by reason of the defendant's negligence, carelessness and recklessness as aforesaid, plaintiff was seriously wounded, bruised and injured and suffered severe wounds and cuts in his head and face, resulting in his having severe scars thereon and permanently disfiguring his face and head; and also suffered severe wounds and cuts on his thigh, hip, legs and feet; he also suffered the amputation of his right arm at its junction with the shoulder and was severely injured and bruised in and about his body, with the result that he has ever since been incapacitated and caused to suffer great pain of body and mind and suffer severe mental and nervous shock and, as plaintiff is informed and verily believes, his injuries as aforesaid will be permanent and he will be permanently disabled and caused to suffer continuous pain, humiliation and inconvenience, and ever since said injuries, the plaintiff has been and will be permanently prevented from attending to his usual vocation and plaintiff's earning capacity has been permanently impaired; and the plaintiff has necessarily paid and has become liable to pay expenses for medical and surgical attendance and for nursing and for medicines and will hereafter necessarily incur further expenses of a similar character, all to the plaintiff's damage in the sum of $100,000.

Wherefore plaintiff demands judgment in the sum of $100,000 with the costs and disbursements of this action.

Bernard G. Nemeroff, Attorney for Plaintiff, Office & P. O. Address, 11 Broadway, Borough of Manhattan, City of New York.

[fol. 7] *Duly sworn to by Bernard G. Nemeroff. Jurat omitted in printing.*

[fol. 8] IN UNITED STATES DISTRICT COURT

[Title omitted]

STIPULATION AMENDING COMPLAINT

It is hereby stipulated and agreed by and between the attorneys for the respective parties hereto as follows:

1. That paragraph "Third" of the complaint herein, the first line thereof, be amended to read as follows: "That on or about the 27th day of July, 1934."

2. That the defendant owned, operated and controlled the tracks and trains referred to in the complaint at the time of the accident set forth therein.

Dated, New York, October 4th, 1934.

Bernard G. Nemeroff, Attorney for Plaintiff. Davis, Polk, Wardwell, Gardiner & Reed, Attorneys for Defendant.

[fol. 9] IN UNITED STATES DISTRICT COURT

[Title omitted]

NOTICE OF APPEARANCE

Please take notice that we are retained by and appear in this action as Attorneys for the defendant above named and demand that a copy of all papers in this action be served on us at our office number 15 Broad Street, Borough of Manhattan, City of New York, New York.

Dated, New York, September 18, 1934.

Davis, Polk, Wardwell, Gardiner & Reed, Attorneys for said Defendant, Office and Post Office Address, No. 15 Broad Street, Borough of Manhattan, City of New York, N. Y.

To Clerk of the United States District Court, Southern District of New York. Bernard G. Nemeroff, Esq., Attorney for Plaintiff, 11 Broadway, Manhattan, N. Y. C.

[fol. 10] IN UNITED STATES DISTRICT COURT

[Title omitted]

ANSWER

The above named defendant, by Davis, Polk, Wardwell, Gardiner & Reed, its attorneys, for its answer to the complaint herein:

1. Denies that it has any knowledge or information sufficient to form a belief as to the allegations or any of them, contained in paragraph "First" of the complaint.

2. Upon information and belief, denies the allegations, and each of them, contained in paragraphs "Third",

"Fourth", "Fifth" and "Sixth" of the complaint, and especially denies that the plaintiff has been damaged in the sum of One Hundred Thousand ($100,000) Dollars, or in any other sum for which this defendant is responsible, and except that it denies that it has any knowledge or information sufficient to form a belief as to the exact nature, extent and consequences of the alleged injuries to the plaintiff.

3. Further answering the complaint, and as a defense thereto, defendant alleges upon information and belief [fol. 11] that the accident and the injuries to the plaintiff were caused or contributed to by his own negligence or want of care.

Wherefore, defendant demands judgment dismissing the complaint, together with the costs and disbursements of this action.

Davis, Polk, Wardwell, Gardiner & Reed, Attorneys for Defendant, Office & P. O. Address, 15 Broad Street, Borough of Manhattan, City of New York.

Duly sworn to by G. C. Manning. Jurat omitted in printing.

[fol. 12] SUBPŒNA ANNEXED TO BILL OF DISCOVERY

The President of the United States of America to Erie Railroad Co. (a New York Corporation), Greeting:

You are hereby commanded to appear before the Judges of the District Court of the United States of America for the Southern District of New York, in the Second Circuit, to answer a bill of complaint exhibited against you in the said Court in a suit in Equity, by Harry J. Tompkins and to further do and receive what the said Court shall have considered in this behalf. And this you are not to omit under the penalty on you of Two Hundred and Fifty Dollars ($250).

Witness, Honorable John C. Knox, Judge of the District Court of the United States for the Southern District of New York, at the City of New York, on the 10th day of November in the year One Thousand Nine Hundred and

Thirty-four and of the Independence of the United States the One Hundred and fifty-ninth.

Charles Weiser, Clerk.

Bernard G. Nemeroff, 11 Broadway, Solicitor.

The Defendant is required to file its answer or other defense in the above cause in the Clerk's Office on or before the twentieth day after service hereof excluding the day of said service; otherwise the bill aforesaid may be taken Pro Confesso.

Charles Weiser, Clerk. (Seal.)

[fol. 13] IN UNITED STATES DISTRICT COURT

[Title omitted]

BILL OF DISCOVERY

To the Honorable, the Judges of the United States District Court for the Southern District of New York:

Harry J. Tompkins, a citizen and resident of the Borough of Exeter, Commonwealth of Pennsylvania, brings his bill against the Erie Railroad Co., a corporation duly organized and existing under and by virtue of the laws of the State of New York, with its principal place of business in the Southern District of New York, and there operating a steam railway as a public carrier of passengers and freight for hire.

And thereupon your orator complains and respectfully shows:

1. That your orator is twenty-eight years of age, American born, has been married for four years, has a child three years of age and up to the time of the accident hereinafter mentioned, in which your orator lost his right arm, was a [fol. 14] skilled iron moulder and, as such, a member of the International Iron Workers Union.

2. That on the 27th day of July, 1934, your orator resided at 7 Hughes Street, Hughestown Borough, City of Pittston, Commonwealth of Pennsylvania, and when on his way to his said home, at 2:30 A. M. of that day, less than a block and a half therefrom, walking on a beaten foot path towards said home, used for many years past as a public

highway with the knowledge, acquiescence, consent and approval of the defendant, a train owned and operated by the defendant suddenly appeared in the opposite direction and came tearing down toward your orator at a terrific rate of speed on a track running parallel with said highway, and that after the engine of said cars of said train had passed your orator some projection from one of the cars, either the third or the fourth car of said train, projecting way out into the highway, struck your orator and swept your orator backward off his feet under the wheels of a car of said train which ran over your orator and severed his right arm at the point of its junction with the shoulder. That your orator also suffered a laceration of the right supraorbital region, a laceration of the scalp and the right parietal region and numerous other contusions, abrasions, cuts and bruises, and necessarily submitted to a disarticulation of the right shoulder joint at the hospital where he was for some time necessarily confined; that your orator suffered all said injuries through no fault on his part and solely through the negligence of the defendant in permitting said projection to extend out into the said highway at 2:30 in the morning when it was dark and when, in the absence of light, pedestrians could not see such projection.

[fol. 15] 3. That on the 29th day of August, 1934, your orator commenced an action at law in the United States District Court for the Southern District of New York, against the above-named defendant, the Erie Railroad Co., to recover $100,000 damages for said injuries by filing in the office of the Clerk of said Court the summons and complaint in said action and by causing the said defendant, on said date, to be served with a copy of said summons and complaint within said Southern District of New York; that the said action entitled "Harry J. Tompkins, plaintiff, against Erie Railroad Co., (a New York corporation) defendant" was duly docketed in said Court as docket #L58-389; that the said defendant thereafter on or about the 18th day of September, 1934, duly entered its notice of appearance in said action by counsel and on the 28th day of September, 1934, filed in the office of the Clerk of said Court and served on your orator's attorney in said action its answer to said complaint, a copy of which summons marked Exhibit "I", of which complaint marked Exhibit

"II" and of which answer marked Exhibit "III" are hereto annexed and made part hereof; that the said action at law has been at issue since September 28th, 1934 and is still pending and undetermined on the law side of this Court and is now #1535 on the Civil Jury Calendar awaiting trial.

4. That except as to the allegation that the defendant is a New York corporation operating a steam railroad both in the State of New York and in the Commonwealth of Pennsylvania, with its principal place of business in the Borough of Manhattan, City, County and State of New York, which the defendant admits, the answer of the de- [fol. 16] fendant in said action in effect denies each and every allegation of your orator's said complaint in said action at law and thus raises issues therein making it incumbent upon your orator, in order to establish a prima facie case, to prove the allegations of your orator's said complaint with respect to the defendant's negligence and the other elements of your orator's cause of action; that the said defendant moreover on the 28th day of September, 1934, through its counsel in said action, caused to be served upon your orator's attorney in said action at law a demand for a bill of particulars, a copy of which marked Exhibit "IV" is hereto annexed and made part hereof, requiring your orator to "describe in detail" the aforesaid accident, to "specify the exact manner in which it is alleged the accident occurred", to "describe in detail the manner it is alleged that the defendant was negligent", to "indicate, by name, occupation or otherwise, the agents, servants or employees of the defendant who are alleged to have been negligent", to "describe in detail the object which it is alleged the defendant negligently permitted to project from the said train, including its dimensions, its nature and its location on the train."

5. That because the said accident happened in the dark at 2:30 in the morning and because of the manner in which the said accident happened, after a number of the cars of the train had passed your orator and was flying past your orator at a terrific speed and because your orator was struck suddenly with violent force and thrown under the wheels of the car, your orator is unable to state and your orator does not know what object the defendant permitted to project from the said train, much less the dimensions, [fol. 17] its nature and its location on the train, and your

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[fol. 1]

IN UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

HARRY J. TOMPKINS, Plaintiff-Appellee,

against

ERIE RAILROAD CO. (a New York Corporation), Defendant-Appellant

STATEMENT UNDER RULE XIII

The above entitled action was commenced by the service of a summons and complaint on the defendant-appellant on or about August 29, 1934. Notice of appearance for defendant was served on September 18, 1934. Issue was joined by the service of the defendant's answer on the 28th day of September, 1934. Complaint was filed on the 7th day of September, 1934, and answer was filed on the 28th day of September, 1934. The original parties were those above mentioned. The defendant was not at any time arrested, and no bail has been taken and no property attached.

This action was tried by Honorable Samuel Mandelbaum and jury on the 5th, 6th, 7th and 13th days of October, 1936. The case was submitted to the jury and on the 13th day of October, 1936, the jury rendered a verdict in favor of the plaintiff and against the defendant in the sum of $30,000 and at the close of the said trial and the rendition of the said verdict by the jury, counsel for the defendant made a [fol. 2] motion to set aside the said verdict and for a new trial on the grounds that the verdict was against the weight of evidence and the law, etc., and after due deliberation, Honorable Samuel Mandelbaum denied the said motion without opinion on or about November 9, 1936.

A judgment in the sum of $30,000 together with costs in the sum of $95.00 and interest in the sum of $165.00, herein appealed from, was entered on the 16th day of November, 1936. This appeal was taken on the 16th day of November, 1936.

There has been no change of attorneys for the respective parties.

(a) Specify the exact date, time and place of the alleged accident.

(b) Indicate the exact place on the defendant's property where the accident is alleged to have occurred.

[fol. 25] (c) Specify the exact manner in which it is alleged the accident occurred.

Second. Describe in detail the exact manner in which it is alleged that the defendant was negligent, and in particular,

(a) Specify in detail the manner in which it is alleged that the defendant was negligent.

(b) Indicate, by name, occupation or otherwise, the agents, servants or employees of the defendant who are alleged to have been negligent.

(c) Describe in detail the object which it is alleged the defendant negligently permitted to project from the said train, including its dimensions, its nature, and its location on the train.

Third. Specify in detail the exact nature, extent and consequences of the alleged injuries to the plaintiff, and in particular,

(a) Indicate each and every injury alleged to have been sustained by the plaintiff, and which, if any, of the same are alleged to be permanent.

(b) Specify the exact period plaintiff is alleged to have been prevented from performing his regular duties and the loss of salary, if any, therefrom.

(c) Specify the exact period which the plaintiff has been prevented from performing duties of any character and the loss of salary, if any, therefrom.

[fol. 26] (d) Itemize in detail the amounts alleged to have been expended by the plaintiff as the result of this accident for medical expenses, hospital bills, etc.

Dated, New York, September 25, 1934.

Yours, etc., Davis, Polk, Wardwell, Gardiner & Reed, Attorneys for Defendant, Office and Post Office Address, 15 Broad Street, Borough of Manhattan, City of New York.

To Bernard G. Nemeroff, Esq., Attorney for Plaintiff, 11 Broadway, Borough of Manhattan, City of New York.

[fol. 27] IN UNITED STATES DISTRICT COURT

[Title omitted]

PLAINTIFF'S BILL OF PARTICULARS

SIR:

Please take notice that the following is a bill of particulars of the plaintiff's cause of action, as demanded by the defendant herein:

1. (a), (b) The accident occurred on July 27th, 1934, at about 2:30 A. M. on a foot path located between the Rock Street Crossing and Hughes Street, on the north side of the tracks and about 60 feet easterly of the Rock Street crossing.

(c) That as the plaintiff was lawfully on a foot path, adjacent to the defendant's railroad tracks, the defendant was negligent and careless in permitting one of the doors of its cars or some other similar object to project from the side of the train, striking the plaintiff without warning, as a result of which he was thrown to the ground and under the wheels of the train.

[fol. 28] 2. (a) Defendant was further negligent and careless in permitting, maintaining, and asquiescing, for a long period of years, a foot path and highway to be located so close to its tracks as to be dangerous to life and limb, and without protecting the same in any way, and in further failing to make proper inspection of its trains, so that no object would extend over the pathway as the trains passed the aforesaid public path and highway.

(b) Plaintiff at this time is without knowledge or information as to the names or occupations of the agents, servants or employees of the defendant who were negligent.

(c) Plaintiff is without accurate knowledge as to the exact dimensions of the object which projected from the train operated by the defendant, as described in the complaint, except that the said object projected at least a sufficient distance from the side of one of the cars of the said train to strike the plaintiff while he was a safe distance from the said train. The projection extended from one of the cars immediately following the engine. Plaintiff does

not know the exact location of the car with its relation to the engine.

3. (a) The plaintiff suffered the following injuries as the result of the accident complained of herein: Traumatic amputation of the right arm, about 1½ inches below the shoulder joint; laceration of the right supra-orbital region with resultant scars of permanent nature; laceration of the scalp in the right parietal region resulting in scars of a permanent nature; and was severely injured and bruised in and about his body and caused to suffer great pain of body and suffered severe mental and nervous shock and [fol. 29] is informed that said nervous shock will be of a permanent nature.

(b) Plaintiff has been unable to perform his regular duties from July 27th, 1934, the date of the accident complained of, until the present time, and believes he is permanently incapacitated from resuming his former occupation. Plaintiff's salary prior to the accident complained of was the sum of approximately eight dollars a day.

(c) Plaintiff has been prevented from performing duties of any character until the present time and his said total incapacity will be permanent.

(d) Plaintiff has incurred to date in an effort to cure himself of the injuries complained of the following expenses: For physicians and surgeons $350.00; for hospital $89.00.

Dated, New York, N. Y., April 29, 1936.

Bernard G. Nemeroff, Attorney for Plaintiff, Office and P. O. Address, 32 Broadway, Borough of Manhattan, City of New York.

To Davis, Polk, Wardwell, Gardiner & Reed, Esqs., Attorneys for Defendant, 15 Broad Street, New York City.

[fol. 30] *Duly sworn to by Bernard G. Nemeroff. Jurat omitted in printing.*

[fol. 31] In United States District Court, Southern District of New York

L 58—389

Harry J. Tompkins, Plaintiff

against

Erie Railroad Co. (a New York Corporation), Defendant

Statement of Evidence

Before Hon. Samuel Mandelbaum, D. J., and a Jury

New York, October 5th, 1936,
10:30 o'clock a. m.

Appearances:

Bernard C. Nemeroff, Esq., Attorney for Plaintiff; Everett G. Hunt, Esq., of Counsel.

Davis, Polk, Wardwell, Gardiner & Reed, Esqs., Attorneys for Defendant; Theodore Kiendl, Esq., of Counsel.

(A jury was duly empaneled, examined and sworn.)

[fol. 32] (Mr. Hunt opened to the jury on behalf of the plaintiff.)

(Mr. Kiendl opened to the jury on behalf of the defendant.)

Harry James Tomkins, the plaintiff, called in his own behalf, being duly sworn, testified as follows:

(Informal recess.)

Direct examination.

By Mr. Hunt:

Mr. Hunt: May it please the Court, I will offer in evidence a blueprint, the one I used in opening to the jury, showing the general locality of the accident.

Mr. Kiendl: Defendant has no objection.

(Marked Plaintiff's Exhibit No. 1.)

Q. Mr. Tompkins let me ask you to keep your voice up, take a comfortable position and keep your voice up so that the last gentleman can hear down here (indicating). This is your first experience in court, is it?

A. Yes, sir.

Q. How old a man are you?

A. 29.

Q. And you were born where?

A. Hughestown Borough.

Q. That is the place we have been talking about?

A. Yes, sir.

Q. You stayed in school until you were how old?

A. 15.

Q. You were one of a number of children, were you not?

A. Yes, sir.

[fol. 33] Q. You went to work as soon as you could?

A. Yes, sir.

Q. And your first work you did was what?

A. In a knitting mill.

Q. And after a short time there did you take up some other work?

A. Yes, sir. I worked in a coal breaker.

Q. And then?

A. I worked in a foundry, a stove foundry.

Q. That is the one I wanted to ask you about. What is the name of the foundry company?

A. Pittston Stove Works.

Q. And in that place you learned a trade, did you not?

A. Yes, sir.

Q. And that trade is known as what in the business?

A. Moulding trade.

Q. That is a trade where the work amounts to what?

A. You mean the wages?

Q. No, the work; what is the nature of the work?

A. Why, it is making the parts for stoves out of sand moulds.

Q. And that trade has a union and you were one of the union men, were you?

A. Yes, sir.

Q. You worked for that concern how many years altogether?

A. 14 years.

Q. Now, going right to the time of the accident, immediately before had you actually been working, or what was the condition?

A. The foundry was shut down.

Q. And had been for how long before?

A. I believe about two months.

Q. So that you had been out of work during that time?

A. Yes, sir.

Q. Did you occasionally during that time find some little odd jobs to do?

A. Well, I would go out and repair stoves, if I could get jobs, at private homes.

[fol. 34] Q. You have seen this blueprint before, have you not, Mr. Tompkins?

A. Yes, sir.

Q. And I will first ask you to look at it and place the letter T, indicating your name, on the house where you resided with your family at the time of this occurrence.

A. (Witness complies.)

Mr. Hunt: May I go over that, with the Court's permission.

The Court: Surely.

(Mr. Hunt retraces the letter placed by witness.)

Q. That house you have indicated is the second house from the corner of Hughes Street and the railroad tracks?

A. Yes, sir.

Q. Now——

The Court: Is that house on Hughes Street?

Mr. Hunt: That house is on Hughes Street.

The Witness: Yes, Sir.

Mr. Hunt: And, Mr. Kiendl, I assume that we agree for the purposes of the trial that the railroad track runs generally in a northerly and southerly direction?

Mr. Kiendl: It has been so stipulated already.

Mr. Hunt: Yes.

Q. Now, how long did you live at that particular place prior to the accident.

A. Three years.

Q. How long, Mr. Tompkins—you said you were born right there in this village, were you?

A. Right in the borough, yes, sir.

[fol. 35] Q. And you were familiar with that section, I assume, from the time you were a child?

A. Yes, sir.

Q. When you come down in an easterly direction on Hughes Street does Hughes Street cross the railroad tracks or does it end at the railroad tracks?

A. It ends at the railroad tracks.

Q. After you cross—assuming you had crossed over the railroad tracks from the end of Hughes Street, what is in this vacant plot over here that is shown on the blueprint to the east of the tracks?

A. A baseball ground.

Q. And then farther down are there any buildings?

A. Yes, sir.

Q. What buildings are farther down?

A. Houses on the other street.

Q. Where is the schoolhouse?

A. It is——

Q. Is it east of west of the railroad tracks? Have you got your directions clear? Do you know which is east and which is west there?

A. East, it is.

Q. The schoolhouse would be east of the railroad tracks?

A. Yes, sir.

Q. Now, your main highway or the only road that crosses the railroad tracks in this section is known as what street?

A. Rock Street.

Q. That is a grade crossing, is it?

A. Yes, sir.

Q. I mean does it have gates or anything of that kind?

A. No, sir.

Q. Now I want to direct your attention and see if you can describe to these gentlemen in your own way the condition that exists on that land between the northerly side of Rock Street and Hughes Street. That is it has been agreed here that there is a space between the picket fence along in front of the houses on the railroad track, a space [fol. 36] of 35 feet, and it runs from Rock Street over to Hughes Street.

A. Yes, sir.

Q. Now that is what I want to direct your attention to, and will you try in the first instance mentally to describe just what that condition was day in and day out for years,

between Rock Street and Hughes Street. Could you do that, do you think?

A. Well, it has been used for all kinds of automobiles, trucks, and it is honest land, and there is ruts from the cars and things that was in it, and the best place to walk was along that track, there was a well-beaten path there.

Q. Well, let's see if we can separate it. You say along the track was a well-beaten path?

A. Yes, sir.

Q. That had, to your knowledge, been there and had been in use over a period of years. How many years?

A. 12 years.

Q. That is as far as you remember back?

A. That is as far as I remember.

Q. Now could you tell us a little more about—in the first place, can you indicate with your left arm or hand in some way approximately the width of the path?

A. It would be about the width of that desk there (indicating).

Q. You mean that desk—is that the same width as the one alongside of it?

A. Yes.

Mr. Hunt: Well, that is about, may we agree, Mr. Kiendl, approximately two feet?

Mr. Kiendl: Fine.

Q. And that started where?

A. Well, at Rock Street.

Q. And ran how close to the railroad track? You said along the railroad track. That is why I use that expression.

A. Yes, sir.

[fol. 37] Q. How close to the railroad track did that run as it went toward Hughes Street?

A. About two feet from the end of the ties.

Q. Then let me ask you—up where the path was, was that particular part of this 35 feet stretch, was that level ground or not?

A. That was level.

Q. It was level?

A. Yes, sir.

Q. Now, beginning at the edge of the path and running down towards the picket fence, was that level ground or was it not?

orator is unable to indicate and does not know either by name, occupation or otherwise the agents, servants or employees of the defendant who caused said object to project from said train or permitted it to project; in truth your orator is unable to state and does not know precisely in what particulars the defendant, its agents and servants was negligent except that in causing and in allowing any object to project from the train into the highway where it might injure unsuspecting pedestrians; that there were no other pedestrians or persons at the scene of the accident at the time of its occurrence and that your orator therefore has no witnesses nor witness who saw the accident. That all the information in the premises is peculiarly within the knowledge of the defendant and its own agents and servants; that the said train was at the time of the accident carrying freight and that the car of the train from which the object projected, as your orator believes, was bulging with freight; that the blood of your orator bespattered a number of cars of the train which ran over your orator but that your orator was unable to inspect and did not inspect the cars whereas the defendant and its agents and servants did, as your orator verily believes, inspect the cars and from the blood on the said cars and from other evidences was able to ascertain just which cars ran over your orator and from which car the object projected; that the defendant, and its servants and agents, also know where said car was loaded and know the contents thereof and from their inspection of the car, after the accident, know also what the object was that was projecting and how it projected and who caused the same to project, [fol 18] as well as why it was projecting, and as to all of these facts your orator is wholly ignorant and helpless to prove because the witnesses are all in the employ of the defendant and the information is within its own peculiar knowledge and control.

6. That it will be a great hardship on your orator if he were compelled to proceed to the trial of said action at law with all the evidence of the negligence of the defendant within the defendant's exclusive control; that your orator has fully and fairly stated all the facts in the case to his counsel herein and to his attorney in said action at law and has been advised by them after said statement and your orator verily believes that your orator has a meri-

torious cause of action against the defendant in said action at law but that your orator cannot safely proceed to trial and will hardly be able to establish a prima facie case on the trial of said action in law without a discovery and without the aid of this court of equity before trial to afford your orator a discovery of the facts, information and the names of the witnesses in the control of the defendant and that upon such discovery your orator will moreover be able to comply with the defendant's said demand for a bill of particulars.

7. To the end, therefore, that the defendant may, if it can, show why your orator should not have the discovery of all and singular the matters and things herein prayed for, your orator submits herewith the following interrogatories to which the said defendant shall true, direct and perfect answer make:

Interrogatory 1. On July 27th, 1934, at or about 2:30 or 2:45 in the morning, in the Borough of Hughestown, City [fol. 19] of Pittston, Commonwealth of Pennsylvania, was the defendant operating a train through the Borough of Hughestown, City of Pittston, past the crossing at Rock Street?

Interrogatory 2. If so, of how many cars did the train consist?

Interrogatory 3. If so, which of the cars, if any, carried freight?

Interrogatory 4. If any of the first four cars carried freight, i. e., the four cars nearest the engine of said train, (a) what was the number of each of said four cars? (b) what was the particular type and construction of each of said cars? (c) what was the particular type and construction of the doors of each of said cars? (d) at what point were these cars respectively loaded? (e) what were the names and addresses of the persons who did the loading? (f) what was loaded into each car, giving the weight and quantity of the materials loaded into each car? (g) and what was the destination of each of said cars?

Interrogatory 5. What is the name of the station where the said train stopped before reaching Hughestown, Pennsylvania?

Interrogatory 6. At what time did the said train actually leave said station?

Interrogatory 7. At what time was said train scheduled to leave said station?

Interrogatory 8. After the train passed Rock Street crossing in Hughestown, Pennsylvania, on July 27th, 1934, [fol. 20] did the defendant or any of its agents or servants discover any marks or stains of blood or what appeared to be blood on any of said cars?

Interrogatory 9. If so, (a) give the date and the time of the discovery, (b) the names and addresses of the persons who made the discovery, (c) the particular cars of said train so marked or stained with blood or what appeared to be blood.

Interrogatory 10. Give the names and addresses of the servants and agents of the defendant who unloaded the first four cars of the said train, stating the position they at the time occupied with the company, and the time and place of the unloading.

Interrogatory 11. At or before the time of the unloading of the respective first four cars of said train, did the defendant, its agents or servants observe that the rolling doors or other doors or appurtenances of any of said four cars of said train were out of repair? If so describe what was observed in detail.

Interrogatory 12. At the time or before the unloading of any of the said first four cars of said train, did the defendant or any of its agents or servants observe with respect to any of said cars that the door had been forced out or had fallen out of its sliding grooves and/or bulged out? If so describe what was observed in detail.

Interrogatory 13. At the time or before the unloading of any of the said first four cars of said train, did the defend-
[fol. 21] ant or any of its agents or servants observe with respect to any of said cars that one or more objects had been projecting through the door or other apperture of the car or projecting from any part of any of said four cars? If so, describe what was observed in detail.

Wherefore, your orator asks for the aid of the equity side of this Honorable Court in the premises and prays

that its writ of subpœna may issue directly to the defendant, the Erie Railroad Co. and H. R. Cole, Assistant to its Vice-President, and other officials of said defendant, commanding it and them at a certain time therein to be named to appear before this Honorable Court and then and there full, true, direct and perfect answer make to each of the various interrogatories hereinabove set forth.

And your orator will ever pray, etc.

Bernard G. Nemeroff, Solicitor for Complainant, Office & P. O. Address, 11 Broadway, Borough of Manhattan, City of New York.

[fol. 22] *Duly sworn to by Harry Tompkins. Jurat omitted in printing*

[fol. 23] Exhibit I, Annexed to Bill of Discovery

This exhibit consists of the summons printed herein at p. 3.

Exhibit II, Annexed to Bill of Discovery

This exhibit consists of the Bill of Complaint printed herein at pp. 4 to 7, inclusive.

Exhibit III, Annexed to Bill of Discovery

This exhibit consists of the Answer printed herein at pp. 10 to 11.

Exhibit IV, Annexed to Bill of Discovery

This exhibit consists of the defendant's demand for a verified Bill of Particulars printed herein at pp. 24 to 26.

[fol. 24] In United States District Court

[Title omitted]

Demand for Bill of Particulars

Sir:

Please take notice that the defendant herein demands that you serve upon its attorneys, within ten days from the date of service of this notice, a verified bill of particulars as to the following matters, to wit:

First: Describe in detail the accident out of which this alleged cause of action arises, and in particular,

Mr. Hunt: Now, with the Court's permission I would like to be permitted to draw a line where the ruler lays.

The Court: Yes.

(Counsel draws a line.)

Q. You have already told us that until it reached the tracks it was wider at that point than it was after it crossed over the tracks.

A. Yes, sir.

Q. It continued across, you have told us, across Rock Street, have you not, Mr. Tompkins?

A. Yes, sir.

[fol. 43] Q. And after crossing over Rock Street it went on down to what street was that?

A. It went up over the hill.

Q. Over the hill?

A. And down to Center.

Q. And down to Center, and that is the way—now, what was that path used for, if you know?

A. Well, by people going to church, going to any of the homes up in Hughestown from below the railroad and going to the Butler Colliery to work, men going there to work.

Q. The workmen who lived in that part of Hughestown along Hughes Street, to your knowledge, used that path regularly in going to their work?

A. Yes, sir.

Q. So that you will have to describe it, and I don't wish to lead you. Can you describe it somewhat more as to whether it was a well worn path that was or was not——

A. It was a well worn path.

Q. It had been used, to your knowledge, by these different people over a period of approximately how long?

A. 12 years.

Q. Now, did that path and the one alongside the railroad track, did they meet anywhere?

A. Yes, sir.

Q. Now will you tell us where?

A. Right as the path came up out of Hughes it met the one coming up from Rock to Hughes.

Q. And the two paths met about what distance from the end of the railroad ties?

A. About two and one-half or two feet.

The Court: Where did they meet, did you say, these two paths?

The Witness: The one came up out of Hughes Street and it met the other one coming from Rock Street over to Hughes.

[fol. 44] Q. And they met at a point, you stated, about two to two and one-half feet away from the end of the ties?

A. Yes, sir.

Q. That path that runs from Rock Street over to Hughes, during the years that you have lived there, was used by whom?

A. From Hughes to Rock?

Q. From Rock to Hughes or from Hughes to Rock, yes.

A. Why, by teamsters driving coal wagons, coal trucks.

Q. The path itself was used by them?

A. Yes; by men going to work, working at No. 9.

Q. Was there any way to get into Hughes Street from the main street except to walk along this path that existed?

A. Yes, sir.

Q. And if you wanted to get into Hughes Street from the main street you would have to go up to what is called —what is the name of that street?

A. Searle Street.

Q. Searle Street. You would have to go all the way up to Searle Street and then you would walk along Searle Street until you got to Hughes Street?

A. Yes, sir.

Q. That was the only other way to get to these homes on Hughes Street?

A. Yes, sir.

Q. Now, Mr. Tompkins, coming down to the day of your accident, you had I believe you call it supper up there, your last meal, do you not?

A. Yes, sir.

Q. You had your supper that evening about what time?

A. About five o'clock.

Q. Was that your usual time?

A. Yes, sir.

Q. And the little girl at that time was how old?

A. Three years.

Q. Where did Mrs. Tompkins' mother live?

A. In Exeter Borough.

[fol. 45] Q. Exeter Borough. In mileage, from your home to Mrs. Tompkins' mother's home, was approximately how far?

A. Five or six miles.

Q. And had there been any illness at the home of Mrs. Tompkins' mother?

A. Yes, sir.

Q. And did you have a telephone?

A. No, sir.

Q. Did you have an automobile?

A. No, sir.

Q. Did you have some—you can't tell us what, but did you have some talk with Mrs. Tompkins that evening at supper time?

A. Yes, sir.

Q. After that conversation and after you had finished your supper, did you start for the home of Mrs. Tompkins' mother?

A. About an hour after I had my supper I did.

Q. And you proceeded to her home how?

A. I walked.

Q. And you arrived there all right, did you, in due course?

A. Yes, sir.

Q. And you stayed there that evening, did you, Mr. Tompkins?

A. Yes, sir.

Q. Were you there all the time or did you have—or did you go out for a period of time?

A. In the evening I took a walk down about eight o'clock, down to the river.

Q. The Susquehanna River is right near Mrs. Tompkins' mother's home?

A. It is right behind it.

Q. And it is a common practice and custom up there to fish at night, is it not?

A. Yes, sir.

Q. Along the banks of the river?

A. Yes, sir.

Q. You were down there for a while?

A. Yes, sir.

Q. Then did you return to your mother-in-law's home?

A. Yes, sir.

Q. And eventually left her home at about what time?

A. About half-past twelve or one o'clock.

[fol. 46] Q. And then you proceeded towards your own home, you say, and what highway, what is the name of it, what road did you use?

A. Well, I followed the main road from Exeter Borough, I don't know what highway they call it.

Q. On your way home did anything occur? Did you see anybody?

A. Yes, sir.

Q. And try to—you met those people where?

A. On the Fort Jenkins Bridge crossing the Susquehanna River.

Q. I want to get at this. You had proceeded from your mother-in-law's home towards your own home about how far before you reached this bridge?

A. About four miles.

Q. And so you had to go only about another mile to reach your own home?

A. Yes, sir.

Q. What happened there when you got to the bridge?

A. I was walking across the bridge and there was a car pulled up ahead of me and it stopped and one of the men got out, opened the door and called to me and said, "Come on, Harry, we will give you a ride up."

Q. And when you got there you knew those two men, did you not?

A. Yes, sir. I worked with one of them.

Q. One of the young men worked with you?

A. In the foundry with me.

Q. And the other gentleman was who, the man driving the car?

A. Was Mr. Harrington.

Q. Was he chief of police at that time or before that?

A. Before that.

Q. And so you got in the car and went where?

A. Right up Rock Street and across the crossing.

Q. And they stopped and let you out on which side of the crossing, the side towards your home or just beyond the crossing?

A. Right up over the crossing.

[fol. 47] Q. And you got out, did you?

A. Yes, sir.

Q. And, I assume, said goodnight to the gentlemen?

A. Yes, sir.

Q. Now then, from that point where you got out, in order to reach your home from the point where you got out, you would walk where?

A. I would cross the track and walk over Hughes Street over to Hughes Street along the track.

Q. You were on Rock Street when you got out, of course?

A. Yes, sir.

Q. And then you stepped back across the tracks toward what place, where the path began?

A. Yes, sir.

Q. And then to reach your home you would simply walk along the path until it ended and you went diagonally into Hughes Street?

A. Yes, sir.

Q. Now I want you to speak slowly and take your time and in your own words try to describe to us everything that you can remember, everything that happened from the time you took the path at Rock Street and started toward Hughes Street. Do you think that you can do that?

A. Yes, sir.

Q. Well, go ahead and do this, then, if you will, please.

A. I was about half ways over the block when I heard the whistle and I seen the headlight of a train, so I kept right on walking and I had walked it plenty of times and I wasn't a bit afraid, and when I got to almost where the paths joined, all but a few steps, the engine passed me.

Q. Passed you without any trouble?

A. Yes, sir; and when I got right on the path there was something came up in front of me, a black object that looked like a door to me, and I went to put my hands up and I guess before I got them up I was hit.

[fol. 48] Q. And you were stuck where, first?

A. Right here (indicating side of face).

Q. On your righthand side, and is there any—are there any scars still there?

A. Yes, sir, right through the eyebrows (indicating).

Mr. Hunt: Mr. Kiendl, can we agree, to save time here, that on the right side—just hold your face around where the jury can see you—there is a scar running from within the eyebrow down through the eye-lid for a distance of what is that distance, three-quarters of an inch?

Mr. Kiendl: Well, whatever it is we will agree on to save time.

Mr. Hunt: Rather a big scar. I think that is a fair description, isn't it?

Mr. Kiendl: I think that is perfectly fair, Mr. Hunt.

Q. That is where you were struck first by whatever it was?

A. Yes, sir.

Q. Have you any conscious recollection of how you were thrown under the train or anything of that kind?

A. No, sir.

Q. You were where the next time that you were either conscious or semi-conscious?

A. In the receiving room of the hospital.

Q. And can you tell us what your condition was at that time, so far as you were able to understand?

A. Well, my arm was off, I knew that when I came to.

Q. You knew that when you came to?

A. Yes, sir.

Q. And were you then put under the doctor's care?

A. Yes, sir.

[fol. 49] Q. And was there an operation performed to the end of the stump?

A. Yes, sir.

Q. Go ahead, if you will, Harry, and tell us what your condition was while you were there in the hospital. If you had any pain, you should tell us about it.

A. Well, when I came to they had a blanket or something wrapped around my arm. I had a little stump. And I told the doctor not to take it off until I went to sleep, so he gave me a shot in the arm, and I asked him if it would put me to sleep, and he said yes. So when I came to again they had me all fixed up. I did not feel much pain then, but the next morning I was delirious and they let me lay until one o'clock and then they took me up and operated me.

Q. Do you know what that operation was, what the purpose was?

A. Yes, sir.

Q. What was it?

A. They took my arm right out of the socket.

Q. You have no stub or anything?

A. Or no socket; they took the socket too.

Q. And after that, tell us briefly, without going too much into detail, how did you progress while you were there in the hospital?

A. Well, I was there 21 days and they discharged me but my shoulder was still draining from the infection from the rusty rails, and I went to the dispensary for about two months and they cut it open again for an abscess.

Q. Drained it out again?

A. Put a drain in it, yes, sir.

Q. And then what happened after that?

A. Well, they had the drain in for a few weeks and it cleared up.

Q. And since then you have had no recurrence of that?

A. No, sir, but the "fingers" always hurt me.

[fol. 50] Q. You have that—that is the sensation, is it not?

A. No, sir, I feel them, they hurt.

Q. And that has been so from the time of the accident down to the present time?

A. Yes, sir.

Q. Harry, you didn't have enough education so that you are able to do any office work or anything of that kind?

A. No, sir.

Q. Something was suggested here by Mr. Kiendl in his opening that you slipped or something of that kind. Did any such thing happen?

A. No, sir.

Q. The path itself was a perfectly solid clean path, was it not?

A. Yes, sir.

Mr. Hunt: Your witness.

Cross-examination.

By Mr. Kiendl:

Q. Mr. Tompkins, as I understood it, you went to school and continued in school until you were fifteen years old?

A. I believe about that.

Q. And you learned how to read?

A. Yes, sir.

Q. You learned how to write?

A. Yes, sir.

Q. And you can read the English language?

A. Yes, sir.

Q. And you can write the English language?
A. Yes, sir.
Q. Do you know a man by the name of Bernard C. Nemeroff?
A. Yes, sir.
Q. And does he sit at counsel table with Mr. Hunt?
A. No, sir.
Q. Well, he is the lawyer that you retained in this case, is he not?
A. Yes, sir.
Q. And you retained him in the month of August, 1934?
A. Yes, sir.
Q. Less than a month after your accident happened?
A. Yes, sir.
[fol. 51] Q. Right?
A. Yes, sir.
Q. And told him how the accident happened?
A. Yes, sir.
Q. And he agreed to take your case?
A. Yes, sir.
Q. Now, you have been shown two pictures?
A. Yes, sir.
Q. Plaintiff's Exhibits 2 and 3. Did they show the conditions of that piece of land between Rock Street and Hughes Street as they existed on the day when your accident happened?
A. The one does, the other one I could not see the path in.
Q. Now, the one you said does is this one (exhibiting)?
A. Yes, sir.
Q. Plaintiff's exhibit 3, isn't it?
A. Yes, sir.
Q. And the one that does not is Plaintiff's Exhibit 2 (handing)?
A. Yes, sir.
Q. Now, looking at Plaintiff's Exhibit 2, I am going to ask you, Mr. Tompkins, whether that picture shows the track and the land between the track and the picket fence from Rock Street on up north? It does, doesn't it?
A. Yes, sir.
Q. Does it show it the way it looks or the way it looked on the day of the accident, or doesn't it?
A. Yes, but the path——

A. It started to slant there.

Q. And after you started on the down slope you said something about there were ruts, and what else did you say about that?

A. There would be ruts and it would be slanted.

Q. Let me ask you, were there any paths down in there after you got off the slope?

A. No, sir.

Q. As a matter of fact, something was said about that by Mr. Kiendl. Did you ever see anybody walking down in the low part of this land?

A. No, sir.

Q. As a matter of fact, in rainy weather was it in a passable condition or was it not, so far as a pedestrian was concerned?

A. It was not.

Q. And let me ask you, the houses themselves, the house level of these adjoining houses, was that the same as the main track of the railroad or was the track higher than the level of the houses?

A. The track was higher.

Q. So that this low land that we have been referring to was down near the houses and approximately on the same level as the houses?

A. Yes, sir.

Q. The path was up on the high ground adjoining the track?

A. Yes, sir.

Q. And that path you told us started at Rock Street and [fol. 38] ran alongside the track until you got over to Hughes Street, Mr. Tompkins. Now——

Mr. Kiendl: I don't think he did tell us that.

Mr. Hunt: I am sorry.

Q. Where did it go to, Mr. Tompkins?

A. The only place I ever walked it was from Hughes to Rock.

Q. Yes. Well, it started, you told us, at Rock Street?

A. Yes, sir.

Q. And ran along the tracks how far?

A. To Hughes.

Q. To Hughes. Now, when you arrive near Hughes, will you try to tell his Honor and these gentlemen what other

condition existed there at that time and had existed, if you know what I refer to.

A. Well, there had been a path that comes out, out of Hughes Street and crosses the track there diagonally and goes up over the hill and joins on to Center Street in Hughestown Borough, leading to the Butler Colliery.

Q. Now you see, Mr. Tompkins, we have never been there, and I know it is very familiar to you. That path that you have just——

Mr. Hunt: Your Honor, I will offer in evidence two photographs taken by the defendant company which were produced upon the taking of a deposition.

Mr. Kiendl: To which there is no objection.

(Marked Plaintiff's Exhibits Nos. 2 and 3 respectively.)

[fol. 39] Mr. Kiendl: It is stipulated, Mr. Hunt, that these photographs show with reasonable certainty the conditions that existed at the time of the accident?

Mr. Hunt: I am going to ask the witness right now.

The Court: Are these photographs supposed to be taken by the defendant?

Mr. Hunt: They were taken by the defendant company.

Q. I will show you an exhibit which I have offered in evidence, and ask you to look at it closely, Mr. Tompkins, and can you see from where you are sitting—being Plaintiff's Exhibit 3—can you see?

A. Yes, sir.

Q. And along there can you see the path as it was, that you have described, as it was at the time this photograph was taken?

A. Yes, sir.

Q. Can you see the path?

A. Yes, sir.

Q. Now Mr. Kiendl wanted me to ask—will you look at it closely, and in regard to the balance of the 35 feet between the track and the fence——

A. Yes, sir.

Q. Is that the same as it was at the time this accident happened?

A. Yes, sir.

Q. So far—do you recall what the weather had been shortly before this accident, as to whether you had had any rainy season or not, or don't you remember?

A. I don't remember.

Q. Now, during the rainy season what condition did the lower part of this land get into?

A. Why, it was all muddy and soggy.

Q. It was like any other dirt road?

A. Yes, sir.

Mr. Hunt: Does your Honor care to see this?

[fol. 40] The Court: I have a copy.

Mr. Hunt: Now I will ask permission to show this to the jury, may it please the Court.

(Exhibit 3 handed to the jury.)

Mr. Kiendl: Do you stipulate as to the other one, Mr. Hunt, that that shows with reasonable accuracy the conditions that existed at the time of the accident?

Mr. Hunt: Yes, I will stipulate that. I don't know what the condition of the road should be here. I don't know that I ought to stipulate. I don't think the young man himself does.

Mr. Kiendl: Well, he identified one. I would like them to be identified,—you have put it in evidence—either as an accurate picture or an inaccurate picture. I don't care which.

Mr. Hunt: This picture was taken, Mr. Kiendl—now, don't—this picture was taken so far back, your camera is so far away, you have brought up a close-up picture.

Q. Will you look at that and can you say from the angle at which that picture is taken, can you see the path which you have told us about? Can you see the beginning of it?

A. No, sir.

Q. You mean from that particular angle it does not show up as it does in the close-up picture?

A. No, sir.

The Court: Are you reading from No. 2?

Mr. Hunt: This is from Plaintiff's Exhibit 2.

[fol. 41] Q. Now, Mr. Tompkins, you were telling us about another path that approached Hughes Street, and I will ask you if you will look at the diagram and indicate first with your left hand the general direction that that path took and where did it lead to, if you know?

Mr. Kiendl: Is this the second path, Mr. Hunt?

Mr. Hunt: This is the second one.

A. It came up through Hughes, came over this way, over the tracks, right up to Rock Street and right up over the hill.

Q. Of course, was that a perfectly straight path or was it like all paths; did it wind or was it perfectly straight?

A. Well, it would wind.

Q. Well, could you take a ruler——

Mr. Kiendl: I object to the form of the question, if your Honor please, and move to strike out the answer on the ground that counsel assumes that all paths wind. I understood the testimony in this case is that the path in question between Rock and Hughes Street did not wind.

Mr. Hunt: That is true, sir.

The Court: Suppose you reframe the question.

Q. What kind of a path was this after it crossed the railroad track, where did it lead to and what kind of a path was it?

Mr. Kiendl: I object to that as wholly immaterial. The path across the railroad track has nothing to do with the issues in this case.

[fol. 42] The Court: Overruled.

Mr. Kiendl: May I have an exception?

Q. What kind of a path was it? I mean just describe it generally.

A. Well, where it came off Hughes Street it was wide, a wide path, it came over the track and then when it came over the track it was not so wide and went right up over the hill to Rock Street and up over the hill.

Q. And led to where?

A. Up to Center Street in Hughestown and to the Butler Colliery; from Center Street, it led to Center Street and than it followed Center Street to Butler Colliery.

Q. And the only street that that path crossed on the way was this so-called Rock Street?

A. Yes, sir.

Q. Now will you take a ruler and lay it there at an angle that you have indicated so that you can give us the general direction that that path took? Can you do that for us, please?

A. (Witness complies.)

Q. And that is within a block or two?
A. Yes, sir.
Q. Of this very place?
A. Yes, sir.
Q. And you lived there for ten years?
A. Yes, sir.
Q. 10 or 12 years I think you said.
A. Yes, sir.
Q. So altogether this is the fact, isn't it, Mr. Tompkins, that you lived within two blocks of the site of the place where you were hurt for some 12 or 14 years, right?
A. Yes, sir.
[fol. 56] Q. And you can't tell us now how people get into that house?

Mr. Hunt: He has already answered that.
Mr. Kiendl: I ask that it be answered again, your Honor.
The Court: Proper cross-examination. Objection overruled.

Q. You can't tell us yet how people get into that house that has the gate that you see in this particular Plaintiff's Exhibit 3?
A. Well, I presume they get in the front gate. There is a front gate too.
Q. Is there a front gate?
A. Yes, sir.
Q. But you have never seen anybody walk through this particular gate?
A. No, sir.

The Court: Did you ever see how they got out?
The Witness: Well, no, I never was around when they were coming out and going in.

Q. Did you ever see any people delivering milk?
A. No, sir.
Q. Or groceries or anything of that kind?
A. No, sir.
Q. Or going through that gate to this house?
A. No, sir.
Q. Never?
A. No, sir.
Q. Now, Mr. Tompkins, did it rain on the 27th of July, 1934?
A. I don't know.

Q. Well, you haven't any recollection of it raining while you were walking?

A. No, sir.

Q. Along the track that night?

A. No, sir.

[fol. 57] Q. You know it wasn't raining, don't you?

A. No, sir, not that night.

Q. And you can't tell us when, if ever, it rained before that night?

A. No, I don't recall.

Q. You haven't any recollection on that at all?

A. No, sir.

Q. Have you any recollection as to the surface of the ground between Rock Street and Hughes Street on the night in question?

A. Well, it was never good, the ground was always bad except on the one spot where that path was.

Q. Yes. Well, you are judging or telling us what you observed with your eyes?

A. Yes, sir.

Q. You never walked on it?

A. No, sir.

Q. The only place you ever walked was the path?

A. Yes, sir.

Q. Now, the path that night, was there any indication of it being wet or not?

A. No, sir.

Q. Slippery?

A. No, sir.

Q. Good hard path?

A. Yes, sir.

Q. No indication of any rain on it that you remember at all?

A. No, sir.

Q. Now, was there anything in that territory, Mr. Tompkins, as you were walking alongside the railroad track, was there any reason that you know of why you could not have stepped aside two or three feet if you wanted to?

Mr. Hunt: I object to that as purely argumentative, it is not a question.

The Court: Objection overruled.

Mr. Hunt: Exception.

Q. (Read.)

A. Well, if I had stepped aside I would have been on the slant and I might have fell there if I stepped aside.

[fol. 58] Q. You don't mean the slant that is shown on this picture, Plaintiff's Exhibit 3. Is that what you mean?

A. Slant or rut; there was ruts there where cars drive there.

Q. Yes, but you are talking about the slant and the ruts shown on this picture, Plaintiff's Exhibit 3, is that right?

A. Yes.

Q. Well, when this train came along, Mr. Tompkins, you did not attempt to step to your left at all, did you?

A. No, sir.

Q. And the reason you did not, you were a little afraid about stepping into a rut or stepping on the slant and slipping, is that the reason?

A. Well, I had no fear of walking on the path. I had walked there before when trains went past.

Q. So it never occurred to you to step to the left at any time, did it?

A. No, sir.

Q. But there was no reason why you, a comparatively young man, in good health——

A. Yes, sir.

Q. (Continuing.) —could not have stepped out there five, ten or fifteen feet if you had wanted to, was there?

A. Well, if I had I would be in the ruts and things, if I did.

Q. You would have been in the ruts and things?

A. On the slant.

Q. You would have been in the ruts and on the slant?

A. Yes, sir.

Q. That is what you mean?

A. Yes, sir.

Q. Will you show us on the picture that you say is a fair picture, the ruts that you are talking about, will you show us in Plaintiff's Exhibit 2 the ruts that you are talking about, if you can find them there?

A. That is the roughness right there (indicating).

Q. Ruts?

A. The roughness and ruts where the cars come up right here (indicating).

[fol. 59] Q. Where the automobile tracks are?

A. Yes, sir.

Q. Now I want to inquire into that situation again. When you knew this train was coming——

A. Yes, sir.

Q. (Continuing.) —did it occur to you to get out of the way of that train at all?

A. Well, it occurred to me to be careful. I knew the train was coming.

Q. You knew the railroad track was a place of danger, didn't you?

A. Yes, sir.

Q. And you knew if you got too close to the train you might get hit by something?

A. Positively.

Q. And you had that in mind when you were walking along there, did you not?

A. Yes, sir.

Q. And having that in mind, didn't it occur to you to walk down that little slope there and get out of the way?

A. No, sir. I have walked there so often when trains came by that I did not fear any danger.

Q. I see. So that you were not afraid of getting hit by anything?

A. Oh, yes.

Q. Well now, in your own mind at that time what were you thinking about, what did you think might hit you?

A. I wasn't thinking of anything hitting me.

Q. Well, I thought you said you were afraid you might get hit by something.

Mr. Hunt: No, if it please the Court——

The Witness: No, sir.

Mr. Kiendl: If I am wrong I will withdraw it.

Q. You did not say that?

A. No, sir.

Q. You were walking along there without being afraid [fol. 60] of being struck by anything, were you?

A. I did not think there was any danger; I had walked there plenty of times.

Q. You didn't quite answer my question.

A. Well, no, I did not fear it because I knew the path was wide enough that I could get by without being hit.

Q. You could get by a moving train without being hit?

A. Yes, sir, on that path.

Q. In the middle of the night?

A. Yes, sir.

Q. And that was about 2.30 when this accident happened, wasn't it?

A. Somewhere about that; I don't remember the exact time.

Q. But that is as near as you can fix it, about 2.30 in the morning?

A. Yes, sir.

Q. And it was pretty dark to see where you were heading, wasn't it?

A. Pretty dark, yes.

Q. There weren't any lights around there at all, were there, except the locomotive's headlight?

A. That is all.

Q. And after the engine passed you there weren't any lights there at all?

A. No, sir.

Q. It was just as dark as it can be at that time of night in that place, wasn't it?

A. Yes, sir.

Q. And could you see the side of the engine?

A. Yes, sir.

Q. As it passed you?

A. Yes, sir.

Q. Were you facing it?

A. No, sir, but I could see it.

Q. As it came along you were walking straight ahead?

A. Walking on the path, yes, sir.

Q. Now, this particular path was two feet wide?

A. About two feet from the end of the ties.

Q. I did not ask you that; the path was about two feet wide?

A. Yes, sir.

Q. And then it was about two feet off the end of the ties?

A. Yes, sir.

[fol. 61] Q. Now, had you ever seen any trains on that track before in your life?

A. Yes, sir.

Q. And did you know that the ends of the cars came out over the rails of the track, projected?

A. Yes, sir.

Q. Did you know whether they came out over the ends of the ties, some of the larger cars?

A. Yes, sir.

Q. And about how far would you say you had noticed the side of a train coming over the edge of the ties that you are talking about, a foot or so?

A. No, I cannot say, because I am not sure.

Q. Would you say half a foot or two feet?

Mr. Hunt: From the rail or the ties?

Mr. Kiendl: From the ties.

Q. Well, you can't give us any idea?

A. No, sir.

Q. Well, you had walked along that path frequently?

A. Yes, sir.

Q. Daytime and nighttimes when trains came past?

A. Yes, sir.

Q. And you can't tell the jury how far the farthest point of the train extended over the ties that you see in these pictures?

A. No, sir.

Q. But you know it extended over some, don't you?

A. Yes, sir.

Q. And it extended over in that space of two feet between the end of the ties and the beginning of that so-called path, is that right?

A. Yes, sir.

Q. So that when you were walking on that path, if you were walking in the middle of it, and I assume you were—right?

A. Well, I might have been a little over, I am not saying I walked right in the middle.

Q. Well, so far as you can recall, you were walking right down the path, weren't you?

A. Yes, sir.

[fol. 62] Q. And your right side was within two feet of the ties, the railroad ties?

A. Yes, sir.

Q. Now, are you sure of that?

A. Yes, sir.

Q. And the railroad trains that came along there you knew projected over the ties?

A. Yes, sir.

Q. But you did not know how far?

A. No, sir.

Q. So if I have you correct, Mr. Tompkins, and please correct me if I am wrong, when you were walking along

this path, the moving side of the train was within two feet of the right side of your body, wasn't it?

A. Yes, sir.

Q. And it probably was about a foot from the right side of your body, wasn't it?

A. It was about two feet.

Q. Well, you say it was two feet to the railroad ties.

A. Yes, sir.

Q. And you say the cars extended sidewise beyond the ties?

A. Yes, sir.

Q. You don't know how far?

A. No, I do not.

Q. So the greatest distance that the right side of your body had from this moving train was two feet, and it might have been only one foot, isn't that true?

A. It might have been one.

Q. It might have been one or two feet, and is that about your best recollection?

A. Yes, sir.

Q. That you were within one or two feet?

A. Yes, sir.

Q. Of the sides of these moving cars?

A. Yes, sir.

Q. Now, was that train going fast?

A. Yes, sir.

Q. You have seen railroad trains going through time and time again?

A. Yes, sir.

Q. And I suppose like most young men, they attracted your attention?

A. No, sir, they never attracted my attention. I have seen too many of them.

[fol. 63] Q. Well, it had been a common occurrence for you to see railroad trains?

A. Yes, sir.

Q. You have seen them all your young life?

A. Yes, sir.

Q. You had seen so many of them that you got kind of sick and tired with them, is that right?

A. Well, no, sir. If they came by if I am out, I will see them there.

Q. What I am trying to get at, Mr. Tompkins, have you some conception of the speed of a train?

A. About 30 or 35 miles an hour.

Q. I am not talking about this particular train.

A. Oh.

Q. I am talking about trains generally. You have looked at them often enough so that you have some idea of the rate of speed at which they are traveling?

A. Yes, sir.

Q. And as you were walking along within two feet of the sides of this train, how fast do you estimate the train was going?

A. About 30 or 35 miles an hour.

Q. And would you from your observation of railroad trains describe that as being a terrific speed?

A. No, not terrific.

Q. You did claim that this train moved at a terrific rate of speed, didn't you?

A. No, sir.

Q. Never?

A. No, sir.

Q. Perfectly sure of that?

A. Yes, sir.

Q. You never made the claim that it came tearing down at you at a terrific rate of speed?

A. No, sir.

Q. You never made a claim that it went flying past you at a terrific rate of speed?

A. No, sir.

Q. And if any such claim were made in this case, it would not be true, would it?

A. No, sir.

Q. Because, according to your estimate, the train was going about 30 miles an hour?

A. Yes, sir.

[fol. 64] Q. As a matter of fact, the train was going about 10 miles an hour, wasn't it?

A. No, sir.

Q. Well then, if I get your testimony correctly, Mr. Tompkins, you were walking along within two feet of the side of this moving train that was going past you at the rate of 30 miles an hour, and you kept right on walking alongside of it?

A. Yes, sir.

Q. Without any fear that anything was going to hit you?

A. Yes, sir.

Q. But you can't see the well defined path in that picture? Can you?

A. No, sir.

Q. Now, aside from what the pictures show, Mr. Tompkins, I would like to examine you about what you know about that territory between Rock Street and Hughes Street between the railroad track and the fence. There is a fence that runs right along?

A. Yes, sir.

Q. And substantially a straight fence, isn't it?

A. Yes, sir.

Q. And it goes from one block to the other?

A. Yes, sir.

[fol. 52] Q. Now, that territory from the railroad track to the fence is about 35 feet wide?

A. Yes, sir.

Q. You know that to be the fact, don't you?

A. Yes, sir.

Q. And 150 or 200 feet long, something like that?

A. Yes, sir.

Q. And you told Mr. Hunt on your direct examination that there was a well defined, solid, hard path on a level running right along the railroad track that whole distance.

A. Yes, sir.

Q. Down to Hughes Street?

A. Yes, sir.

Q. And that there was another path that crossed it at Hughes Street?

A. Yes, sir.

Q. Now, the path in Hughes Street you said was a wide path up to the railroad track?

A. Yes, sir.

Q. And Hughes Street runs right down to the railroad track, doesn't it?

A. Yes, sir.

Q. And this path, when you are walking along Hughes Street up to the railroad track, runs right straight out to the track, doesn't it?

A. No sir, it goes a little diagonally.

Q. Goes a little diagonally to the right as you are approaching the track.

A. Yes, sir.

Q. And then crosses over the track?

A. Yes, sir.

Q. And then goes in the direction that you show on this map, Plaintiff's Exhibit 1?

A. Yes, sir.

Q. Now, that is one path that you know about?

A. Yes, sir.

Q. That you have walked over to work time and again and seen people walk over it going to church and going to work?

A. I have not seen people walking over it going to work. I never worked up at that colliery.

Q. You never did, but you have seen other people using that path?

A. Yes, sir.

Q. Now, this other path that ran alongside the railroad [fol. 53] track, you have used that yourself, have you?

A. Yes, sir.

Q. And you have seen others use it?

A. Yes, sir.

Q. Now, outside of those two paths that you have described——

A. Yes, sir.

Q. (Continuing)—is there any other footpath any other place in that 35 feet between Rock and Hughes Street?

A. No, sir.

Q. No place?

A. No, sir.

Q. You are positive of that?

A. Yes, sir.

Q. You have never seen any?

A. No, sir.

Q. And you told Mr. Hunt, and if I am wrong you will correct me, that you never saw anybody walk any place in that territory.

A. No, sir.

Q. Except along these paths?

A. Yes, sir.

Q. Now, you don't really mean that, do you, Mr. Tompkins?

A. Yes, sir.

Q. Well then, are we to understand that you lived in that neighborhood about 12 years?

A. Yes, sir, I lived there all my life in the borough.

Q. Yes, but you lived in that very neighborhood about 12 years?

A. About.

Mr. Hunt: No, he didn't say that.

Mr. Kiendl: Well, I am asking him.

The Witness: About 12 or 14 years in that neighborhood.

Q. 12 or 14 years you lived in that neighborhood?

A. Yes, sir.

Q. And during all that time you were within two blocks of the Rock Street crossing of the railroad company, weren't you?

A. Yes, sir.

Q. And during those 12 or 14 years you tell this Court and jury that you never saw anybody walk in that piece of land that we are talking about between the railroad [fol. 54] track and the fence?

A. No, sir.

Q. And between Rock and Hughes Streets?

A. No, sir.

Q. Every time in those 12 or 14 years that you have seen anybody walking in that territory they were walking on the path that goes up to Hughes Street or they were walking on the Hughes Street path that came up to the track, is that right?

A. Yes, sir.

Q. Now I will ask you again, Mr. Tompkins, do you mean that seriously?

A. Yes, sir.

Q. Did you know that there was a gate in the fence between Rock and Hughes Streets? Did you know that?

A. Yes, sir.

Q. What?

A. Yes, sir.

Q. And was that a gate leading to a house?

A. Yes, sir.

Q. Did you ever see anybody walk through that gate?

A. No, sir.

Q. Did anybody ever live in that house during the 12 or 14 years you were there?

A. Yes, sir.

Q. And you never saw anybody use that gate?

A. No, sir.

Q. Is that the gate that is shown in this picture (handing Exhibit 3)?

A. Yes, sir.

Q. You see the gate?

A. Yes, sir.

Q. And that is the gate leading to the house that is shown on the righthand side of that picture?

A. Yes, sir.

Q. You never saw anybody walk through that gate?

A. No, sir.

Q. You never saw anybody walking from the gate up to the railroad track?

A. No, sir.

Q. And you never saw anybody at any time in your 12 or 14 years walking any other place in that territory than [fol. 55] where you have told us, on the two paths?

A. No, sir.

Q. Do you know how people got into the house shown on that picture?

A. No, sir, I do not.

Q. Well, do you tell this jury, Mr. Tompkins, that you lived there some 12 or 14 years, within a block of that house, with your wife and your child, and you can't tell this jury how people got into that house that is right alongside the railroad tracks there?

A. I did not live around—only three years right around there, but I lived on the other block.

Q. Well, let's see if we get this straight. You lived for three years in the house that you have marked on this map?

A. Yes, sir.

Q. And that is within a block of the house that is shown in this picture?

A. Yes, sir.

Q. Now, for 12 or 14 years you lived in that neighborhood?

A. Yes, sir.

Q. And where did you live before you moved into the house that you have marked with a T?

A. On Searle Street.

Q. On Searle Street?

A. Yes, sir.

Q. That is a street that is shown on this map too, isn't it?

A. Yes, sir.

Q. Without any fear that any coal or something else might have fallen from that train and hit you; that is right?

A. I do not think there was any coal on that train.

Q. Well, you did not know when you saw the train coming what it had on, did you?

A. No, sir.

Q. And did it occur to you that there might have been coal on that train?

A. No, sir.

Q. That might fall off and hit you?

A. No, sir.

Q. Did it occur to you that there might be anything else on the train that might fall off and hit you?

A. No, sir.

Q. You felt perfectly safe in your own mind as you walked along there within a foot or two of a 30 mile moving train, to continue along, and it never occurred to you at any time to get farther away to a place of safety?

A. No, sir.

Q. Now, Mr. Tompkins, do you know a man by the name of Thomas P. Mackin?

A. Yes, sir.

Q. And is he a Justice of the Peace in the section?

A. Not now he is not.

Q. Was he at one time?

A. Yes, sir.

Q. Down in the Borough of Exeter, in the County of Luzerne?

A. Yes, sir.

Q. And were you righthanded?

A. Yes, sir.

Q. Before the accident?

A. Yes, sir.

Q. Had you learned to write lefthanded?

A. A little.

[fol. 65] Q. I show you a signature "Harry Tompkins," and ask you if you can identify that as your original signature made with your left hand?

A. Yes, sir.

Q. Now, that signature, that original signature, I ask you if you remember in November, 1934, swearing to some paper before the Justice of the Peace, Mr. Mackin, whom I have asked you about.

A. I took one to him, but I don't recall it.

Q. You took a paper to him?

A. Yes, but I don't recall just when it was.

Q. We are not interested yet in what it was. You took a paper to him?

A. Yes, sir.

Q. That Mr. Nemeroff had sent to you?

A. Yes, sir.

Q. And you signed the paper?

A. Yes, sir.

Q. Before this Justice of the Peace?

A. Yes, sir.

Q. And you swore to it?

A. Yes, sir.

Q. Now, is this the paper that you signed and swore to—and I show the witness, if your Honor please, the original of a bill of complaint in the discovery proceeding in this action taken from the official files of this court (handing to witness). Can you tell us if that is the paper you signed and swore to?

A. Do you wish me to read it all or just tell you from what I have here?

Q. Well, if you can without reading it, and I will give you an opportunity to read it later on. You can tell now whether that is the paper?

A. Yes, sir.

Q. You know it is, don't you?

A. Yes, sir.

Q. Now that paper came to you, I suppose, in the mail, did it?

A. I don't recall.

The Court: Well, how did you get this paper?

The Witness: I don't remember if it was sent through the mail or brought in to me.

[fol. 66] Q. Well, in any event you know you got it?

A. Yes, sir.

Q. And signed it and swore to it?

A. Yes, sir.

Q. Now, Mr. Tompkins, as you were walking along the track, this path here from Rock Street to Hughes Street, you did hear the whistle of the locomotive, didn't you?

A. Yes, sir.

Q. And was that the usual crossing whistle?

A. Yes, sir.

Q. That engineers blow in that territory?
A. Yes, sir.
Q. You knew it to be?
A. Yes, sir.
Q. And you could hear it distinctly and clearly, couldn't you?
A. Yes, sir.
Q. Before the train came around the curve you heard that whistle?
A. Yes, sir.
Q. Before you could see the headlight of the train you heard that whistle?
A. Well, I heard the whistle and then right after the headlight.
Q. You heard the whistle right after the headlight?
A. Yes, sir.

(The stenographer read the previous answer of the witness as follows: "Well, I heard the whistle and then right after the headlight.")

Q. You heard the whistle?
A. Yes, sir.
Q. Before you saw the headlight?
A. Yes, sir.
Q. And at the time you heard the whistle the train was around the curve, right?
A. Well, it was just coming around.
Q. Just coming around the curve?
A. Yes, sir.
Q. And right after hearing the crossing whistle you saw the headlight?
A. Yes, sir.
Q. And at that time how far would you say the train [fol. 67] was from you—500 feet, 300 feet, 1000 feet, or don't you know?
A. I don't know.
Q. Well, it was a good distance down the track, wasn't it?
A. Not a very far distance, no.
Q. Well, about how far?
A. Well, maybe about a hundred or a hundred and fifty feet.
Q. Well, first you told us you don't know and then you say a hundred or a hundred and fifty feet.
A. That is just about what I would figure there.

Q. Just what you think?
A. Yes, sir.
Q. Somewhere between 100 and 150 feet away?
A. Yes, sir.

The Court: Away from you?
The Witness: Yes, sir.

Q. When you heard the whistle?
A. Yes, sir.
Q. And the crossing whistles are two long and two short blasts of the whistle, aren't they?
A. I don't know.
Q. What did you mean by a crossing whistle? You said this was a crossing whistle. What was it?
A. I figured it was a crossing whistle, when the crossing was there.
Q. Did you figure by any chance it was a warning whistle for you to get away from the railroad tracks? Did you?
A. No, sir.
Q. Well, after you heard the whistle you saw the headlight?
A. Yes, sir.
Q. Did you hear the locomotive bell ringing as this engine went right on by within two feet of you?
A. I don't recall the bell.
Q. You don't know whether it was ringing or not?
A. I don't recall it.
Q. Did you hear the noise of this train as it came around the curve?
A. Yes, sir.
[fol. 68] Q. Did you hear the exhaust of steam on the locomotive as it was going through?
A. I don't remember that.
Q. Well, do you know, Mr. Tompkins, whether the character of the railroad track around that curve, the direction from which the train came, was upgrade or downgrade or on the level?
A. It is level.
Q. It is level?
A. Yes, sir.
Q. Are you sure of that?

The Court: Is that a curve or curb?

Mr. Kiendl: Curve. The curve that I am referring to, if your Honor please, is the slight curve shown in the map. You will see the train came from this direction toward Rock Street, and here is the curve down here (indicating), and it is about, according to this scale, I should say, roughly, 400 feet from the Rock Street crossing and some 250 feet, roughly, from Hughes Street.

Q. Now, did you say that the track was on a level grade coming around that curve?

A. Yes, sir.

Q. Don't you know it is upgrade?

A. No, sir.

The Court: Do you mind illustrating it to the jury so that they can understand it?

Mr. Kiendl: Not at all, your Honor (exhibiting map and describing curve to jury).

Q. The curve is shown plainly in Plaintiff's Exhibit 2, isn't it?

A. Yes, sir.

Q. And that is the curve we are talking about?

A. Yes, sir.

[fol. 69] Q. Now I ask you, Mr. Tompkins, if it is not the fact, to your knowledge, that this railroad track from Avoca up to Rock Street is all upgrade?

A. No, sir.

Q. You say it is all on the level?

A. Yes, sir.

Q. As this engine went by did any steam come out from the side to frighten you at all?

A. I don't recall.

Q. About how many cars passed you before you were struck?

A. Well, the engine had passed me and I don't know how many cars had passed me.

Q. Well——

A. I did not count them.

Q. I thought, and it has been suggested here that three or four cars passed before you were struck. Don't you know?

A. No, I did not count them.

Q. Can you give us some idea?

A. Well, there was a few cars passed me.

Q. How many? Your best recollection.
A. I don't know how many.
Q. Do you know what kind of cars they were?
A. No, sir.
Q. You don't know whether they were coal cars or straight cars, box cars or tank cars?
A. No, sir.
Q. No recollection?
A. No, sir.
Q. Or what kind or type of cars they were?
A. No, sir.
Q. Well, after a few cars passed you——
A. Yes, sir.
Q. (Continuing)—a black object came along, I think you told us?
A. Yes, sir.
Q. It looked like a door to you?
A. Yes, sir.
Q. That was swinging from the side of one of these cars?
A. I could not say that.
Q. Well, when you saw this black object, where was it?
A. It was on the car.
[fol. 70] Q. And was it fast to the side of the car or was it projecting out from the car?
A. Well, I could not see very good. It was coming out from the car. That I know.
Q. Well, you got the definite impression from that black object coming at you and this train moving 30 miles an hour, that it was a door, didn't you?
A. Yes, sir.
Q. And you had that impression on the night of the accident?
A. Yes, sir.
Q. And you have had it from that day to this?
A. Yes, sir.
Q. And has it always been your claim, Mr. Tompkins, that the object that looked like a door to you is the thing that hit you on the night of the accident?
A. Yes, sir.
Q. And did you tell your lawyer, Mr. Nemeroff, that?
A. Yes, sir.
Q. And his assistants and Mr. Hunt?
A. Yes, sir.
Q. And you have told them all that?

A. Yes, sir.
Q. From the very beginning?
A. Yes, sir.

Mr. Kiendl: I would like to have—I assume it is unnecessary to mark these original filed papers in evidence.
The Court: It is a matter of record.
Mr. Kiendl: Yes.

Q. I show to Mr. Tompkins the original bill of discovery which he received, signed and swore to, and ask him to look at the second page of that and tell me whether it is there stated, "That a train owned and operated by the defendant suddenly appeared in the opposite direction and [fol. 71] came tearing down toward your orator at a terrific rate of speed." That is there, isn't it?
A. Yes, sir.
Q. Was that a true statement?
A. No, sir.
Q. Did you sign and swear to that statement?
A. Yes, sir.
Q. Did you read it?
A. Yes, sir.
Q. And you now know it is not true?
A. Yes, sir.

Mr. Hunt: Your Honor, Mr. Kiendl refers to that as a statement. That, I submit, is nothing but a conclusion anyway, as to what is a terrific rate of speed. One man may think one thing and someone else another.
Mr. Kiendl: Yes, but I am taking what this witness testified, your Honor, in cross examination.
Mr. Hunt: Well, he says he does not think so.
Mr. Kiendl: No. He doesn't know.

Q. Now, in that bill of discovery did you read the part of it on page 2, that there was a projection extending into the highway at 2.30 in the morning where it was dark and when in the absence of light pedestrians could not see such projections?
A. Yes, sir.
Q. Was that true?
A. No, sir.
Q. But you read, signed and swore to that statement, didn't you?
A. Yes, sir.

Q. Now I call your attention, Mr. Tompkins, to another statement in that bill of discovery, "That because the said accident happened in the dark at 2.30 in the morning and because of the manner in which said accident happened, after a number of cars of the train had passed your orator [fol. 72] and it was flying past your orator at a terrific speed"—did you read that?

A. Yes, sir.

Q. Was that true?

A. No, sir.

Q. Did you read in that statement, Mr. Tompkins, something to the effect that you did not know what kind of an object projected from the side of the car?

Mr. Hunt: I object to the form of the question, if the Court please. I have no objection if he will read the wording in the affidavit.

The Court: Read the wording, counsellor.

Mr. Kiendl: I will be glad to.

Q. Did you read in that bill of discovery that I now show you, the original of the signed paper sworn to by you——

Mr. Hunt: What page, Mr. Kiendl?

Mr. Kiendl: At page 4.

Q. (Continuing.) "Your orator is unable to state and your orator does not know what object the defendant permitted to project from the said train." Did you read that?

A. Yes, sir.

Q. Was that true?

A. No, sir.

Q. And it goes on to say: "Much less the dimensions, its nature and its location on the train." Did you read that?

A. Yes sir.

Q. Was that true?

A. No, sir.

Q. You got this statement in November, didn't you, of 1934?

A. I don't remember just when it was.

Q. About that time, wasn't it Mr. Tompkins?

A. Well, I don't remember, truthfully.

[fol. 73] Q. Well, just look at it and see. It is verified on November 6, 1934.

A. Well, that must be when I got it, then.

A. Yes.

Q. Why didn't you get off at the corner of Rock and Searle Street?

A. Well, it was closer to my home the other way.

Q. Just a few feet?

A. Oh, more than that.

Q. Well, one way was about a block and a half and the other way was about a block and a quarter?

Mr. Hunt: Your Honor, I think the diagram speaks for itself. He is speaking of blocks up there. I guess they [fol. 80] do not have blocks up there.

The Court: It is argumentative, but at the same time, I don't know, it is cross-examination.

Q. Well, the Hughes Street block from Searle Street to the railroad crossing is a long block, isn't it?

A. From Rock to the railroad was that, Mr. Kiendl?

Q. No; Hughes Street from Searle Street up to the railroad crossing is a long block?

A. Yes, sir.

Q. And the block between Rock Street and Hughes Street along Searle Street is a short block?

A. Yes, sir.

Q. One way you would have to walk a little farther than the other way?

A. There is a half block between Rock Street and where you turn off Searle to Hughes.

Q. A half block where you turn off Searle to Hughes?

A. Yes, sir.

Q. I call that a block. You say that is a short block?

A. Yes.

Q. You had one short block?

A. Yes.

Q. And a good way along the long block on Hughes Street?

A. Yes.

Q. The other way you would have just a short block and then a short block on Hughes Street to your house?

A. The other way would be only a half a block, Mr. Kiendl.

Q. It is what is shown on the map here (indicating)?

A. Yes, sir.

Q. You would have to go this way (indicating) to get to this house on Searle and Rock Street?

A. Yes.

[fol. 81] Q. The other way you would have to go that long block to the railroad track and then up Hughes Street to your house?

A. Yes, sir.

Q. Was Hughes Street from Searle Street to Rock Street in good condition so you could walk along it?

A. Yes, for walking it was.

Q. And Searle Street from Rock Street to Hughes Street, was that in good condition so you could walk along there?

A. Yes, sir.

Q. No slopes, no ruts?

A. No, sir.

Q. And no railroad tracks?

A. No, sir.

Q. Had you often walked around that other way?

A. Well, if I was at my mother's—my mother lived there,—then I would go up that way.

Q. During the luncheon recess did you read the complaint in your action?

A. No, sir.

Q. Did you discuss that with either Mr. Walsh or Mr. Kaufman?

A. Yes, sir.

Q. The complaint?

A. Well, it was——

Q. I do not mean the paper that we have identified with your signature on, the bill of discovery; I am talking about the complaint in this action.

A. No, we just talked about the paper you was asking me about.

Q. You told us before lunch that you had seen the complaint in this action. Do you remember that?

A. Yes, sir.

Q. I show you the original of the complaint in this action produced from the court files and ask you to look at that and see if you can tell us whether or not you had ever seen that or a copy of it at any time.

A. Yes, sir.

Q. Have you read it?

A. Yes, sir.

Q. Did you discuss it with your lawyer, Mr. Nemeroff?

A. No, sir.

[fol. 82] Q. When you read it did you find it was true?

A. Yes, sir.

Q. It says in this complaint, if I may read from the original from the court record: "That as plaintiff was on said footpath, the defendant negligently, carelessly and recklessly and without heed to the safety of the public, ran one of its trains on said railroad track at a high and dangerous rate of speed." Did you read that?

A. Yes, sir.

Q. Was that true?

A. Well, it was going——

Q. Was that true?

A. Yes, sir.

Q. The train was running at a high and dangerous rate of speed, was it?

A. Yes, sir.

Q. 30 miles an hour at half-past two in the morning?

A. Yes, sir.

Q. Through a small country village?

A. Yes, sir.

Q. You considered that a high and dangerous rate of speed, did you?

A. Yes, sir.

Q. Did you ever see trains go through there at 30 miles an hour at other times?

A. Mostly the Ashley freight.

Q. Did you know this train was the Ashley freight?

A. I heard after. I seen it go down different times.

Q. Before and after?

A. Yes.

Q. You knew that the train that was involved in this accident was the Ashley freight?

A. I have heard it, yes, since I have started the case.

Q. Did you hear it before?

A. No.

Q. Had you ever seen this train go through there before the accident?

A. No, I don't think I did.

Q. Had you ever heard it go through there before?

A. Yes, sir.

Q. You heard the whistle night after night a half a block from the railroad track, hadn't you?

A. Yes, sir.

[fol. 83] Q. And you say that you had not seen any trains go over that track at 30 miles an hour at any time except

what you have learned since the accident about the Ashley freight?

A. Yes, sir.

Q. Had you ever seen trains on other railroad tracks go as fast as 30 miles an hour?

A. Yes, sir.

Q. You have seen that thousands of times, haven't you?

A. Yes, sir.

Q. I want you to tell the Court and jury in your own words, Mr. Tompkins, if you can, what you considered to be a high and dangerous rate of speed about this particular train on this particular night when you were hurt.

A. Well, I just thought that that 30 or 35 miles an hour was fast, that is all.

Q. You thought it was too fast to run a railroad train?

A. Yes, sir.

Q. At half-past two in the morning? Did you mean that?

A. Yes, sir.

Q. I will read on from this complaint, Mr. Tompkins. I will repeat part of it: "* * * ran one of its trains on said railroad track at a high and dangerous rate of speed and negligently, carelessly and recklessly omitted, while so operating said railroad train, and although approaching a crossing, to give any signal by ringing of the bell or blowing of the whistle of the locomotive of said railroad train, or otherwise." Did you read that when you read the complaint?

A. Yes, sir.

Q. You did?

A. Yes, sir.

Q. Was that true?

A. About the blowing of the whistle, no. The whistle did blow.

Q. And the headlight on the locomotive was lit and you saw it?

A. Yes, sir.

Q. As the train approached you?

A. Yes, sir.

Q. You never discussed that statement in your complaint in this action with any of your lawyers here, with any of [fol. 84] their assistants, or with anybody else?

A. No, sir.

Q. Why didn't you, Mr. Tompkins? Why didn't you tell them that that was not true?

A. Well, I signed what they sent to me.

Q. You gave us that reason for signing the other paper that I showed you with your signature on, this morning?

A. Yes, sir.

Q. Did you ever sign this paper?

A. I don't recall. If my signature is on it I will know it.

Q. Your signature is not on it. I show it to you. Do you agree with me that your signature is not anywhere on this paper?

A. Yes.

Mr. Kiendl: I think it is conceded that that complaint has not been signed by the plaintiff. That is so, Mr. Hunt?

Mr. Hunt: That is true.

Q. That complaint not having been signed by you, Mr. Tompkins, I ask you again to explain to this Court and jury why it was that when you read in the complaint that no signal was given of this approaching train by bell or by whistle or otherwise you didn't tell your lawyers about it, so that the complaint would have been true?

A. Well, I just signed what they sent to me, that is all. I wanted to do what my lawyers wanted me to.

Q. This you did not sign?

A. No, sir.

Q. Do you want this Court and jury to understand that your lawyers wanted you to do something that was false at any time?

A. No.

Q. They never told you to say that the whistle did not blow on this train, did they?

A. No, sir.

Q. They never told you to say that you did not see the headlight of the locomotive, did they?

A. No, sir.

[fol. 85] Q. When you saw that in the complaint why didn't you call it to their attention?

A. Well, I didn't know what to do about it. I just went along with my lawyers, that is all. What they sent me in I signed.

Q. Mr. Tompkins, what you really mean is that you hoped that you might be able to get away with a charge that you know was not so?

Mr. Hunt: Objected to as incompetent and irrelevant——

The Court: Objection sustained.

Mr. Hunt: (Continuing)—and a pure statement by the railroad lawyer, absolutely unjustified. He knows very well he has not a particle of evidence to justify that statement.

The Court: Mr. Hunt, you must not do that. I said "Objection sustained." There is no necessity for making any speech after it.

Q. Mr. Tompkins, I want to come back to the black object that seemed like a door, that you say hit you.

A. Yes, sir.

Q. I want you to tell the Court and jury in your own words and taking your own time just what you saw, how it appeared to you, and why you got the impression that it was a door.

A. Well, all I seen, Mr. Kiendl, was just a black object in front of me.

Q. A black object?

A. Yes; it was like a shadow, and it seemed to be wide.

Q. As a matter of fact, you hardly saw it at all?

A. And it seemed to be wide. I don't know if it was a door or what it was. I am not saying that it was a door.

[fol. 86] Q. You don't know what it was? You haven't any idea what it was?

A. No, sir.

Q. Why did you say that it seemed like a door?

A. Well, it was wide like those doors on a refrigerator car.

Q. You mean that you saw a black object that was wide?

A. Yes.

Q. How wide?

A. About two and a half, two feet.

Q. Two feet wide?

A. Yes, sir.

Q. Projecting from the side of the car?

A. Yes, sir.

Q. You have a recollection of having seen such an object?

A. Yes, sir.

Q. Coming out from the side of the moving car about two feet?

A. Yes, sir.

Q. It looked black to you?

Q. Well, I assume so (handing).

A. Yes, sir.

Q. Did you notice as any of these cars went by you, Mr. Tompkins, that they were bulging with freight?

A. No, sir.

Q. You didn't notice any condition of that kind, did you?

A. No, sir.

Q. Did you notice in this bill of discovery that I now show you that there is a statement——

Mr. Hunt: What page?

Mr. Kiendl: On page 5.

Q. (Continuing.) "That the car of the train from which the object projected, as your orator believes, was bulging with freight." Did you read that?

A. Yes, sir.

Q. Was that true?

A. No, sir.

Q. Why did you swear to all these statements, Mr. Tompkins, if they were not true?

Mr. Hunt: I object to the form.

Q. Tell us in your own words.

Mr. Hunt: I object to the form of that question, if your Honor please.

The Court: I think that is a proper question.

Q. Now tell us in your own words, if you will, why you swore to these various statements in this bill of discovery that I have pointed out to you that you admit were not true?

[fol. 74] Mr. Hunt: I object to that as incompetent, irrelevant and immaterial as to why he signed a paper that was sent to him by his lawyer to sign.

The Court: Overruled.

Mr. Hunt: Exception.

A. Well, they were sent to me by my lawyer, so I signed them.

Q. You heard Mr. Hunt just say that, didn't you?

A. No, sir.

Q. They were sent to you by your lawyer to be signed. Is that the only reason that you can avow in this court?

A. Yes, sir.

Q. For signing a lot of false statements that I have pointed out to you—that your lawyer asked you to do it.

Mr. Hunt: Objected to.
The Court: Objection overruled and exception.

Q. Is that the only reason you can give us?
A. Yes, sir.
Q. Isn't it the fact, Mr. Tompkins, that you never saw any object on the side of that train and you don't know what it was?
A. No, sir.
Q. And that is the reason you made the statement so you might try to find out if there were any objects protruding, isn't that true?
A. No, sir.
Q. Now, when you got this paper from your lawyer containing admittedly false statements did you get in touch with him by letter or by telephone?
A. No, sir.
Q. Or by coming to New York?
A. No, sir.
Q. And saying "this is not so"?
A. No, sir.
[fol. 75] Q. Did you ever talk to him about it from the time you signed and swore to this paper until the present day?
A. Not about that particular thing, no.
Q. Never did?
A. No, sir.
Q. You have never had any chat with Mr. Nemeroff, who is not here, your lawyer that you retained originally, or with any other lawyer or with any assistant or any other lawyer in this case about those statements?
A. No, sir.
Q. Did you ever claim, Mr. Tompkins, that this train came down on you without any signal or warning of any kind?
A. No, sir.
Q. Never made that claim?
A. No, sir.
Q. You are sure of that?
A. Yes, sir.
Q. Never told that to Mr. Nemeroff, your lawyer?
A. No, sir.

Mr. Kiendl: Have we the original of the complaint?

Mr. Hunt: It is on file. Go ahead and use the copy, Mr. Kiendl. I won't raise any question about it.

Q. Did you ever read the complaint in this action?

A. I don't remember.

Q. Did your lawyer, Mr. Nemeroff, ever tell you he was bringing suit against the railroad company?

A. Yes, sir.

Q. And did he ever send you or give you a copy of the complaint?

A. Yes, I believe he did.

The Court: Gentlemen, don't discuss this case among yourselves or with anyone else. We will take a recess until two o'clock.

(Recess until 2.00 p. m.)

[fol. 76] Afternoon Session

Juror No. 6: Your Honor, about four o'clock I would like to be excused. I am on a registration board.

Mr. Kiendl: That is entirely agreeable.

The Court: The Court will have no objection to that if you gentlemen have not.

Mr. Kiendl: I have not.

Mr. Hunt: I think Mr. Kiendl and I would like to quit then too.

The Court: Well, it is a matter of public duty. This man is a member of a registration board and would like to be excused at four o'clock, so that at four o'clock we will call it a day.

Harry James Tompkins, resumed the stand:

Cross-examination.

By Mr. Kiendl (continued):

Q. Mr. Tompkins, have you discussed during the luncheon period with anybody this bill of discovery that I asked you about before lunch?

A. Yes, sir.

Q. During the lunch hour?

A. Yes, sir.

Q. With whom did you discuss it?

A. Mr. Walsh and Mr. Kaufman.
Q. That is one of the attorneys at counsel table?
A. Yes, sir.
Q. And Mr. Wallace?
A. Mr. Walsh.
Q. And who else?
A. Mr. Kaufman.
Q. Who is he, is he one of your attorneys?
A. Yes, sir.

Mr. Hunt: He is the young man that was here this morning.

[fol. 77] Q. Anybody else?
A. No, sir.
Q. And you discussed your testimony?
A. Yes, sir.
Q. And did you discuss it with Mr. Nemeroff, your lawyer?
A. No, sir.
Q. You have not seen or talked to him about it?
A. No, sir.
Q. Are there any other reasons that you have thought of during the lunch hour why you signed and swore to these statements?
A. No, sir.
Q. And Mr. Walsh and Mr. Kaufman both asked you about it, did they?
A. Yes, sir.
Q. And you have nothing more to add to what you told us about it this morning before the luncheon recess?
A. No, sir.
Q. As I understand it, Mr. Tompkins, you went to visit a sick mother-in-law on the night of July 26th?
A. Yes, sir.
Q. And she lived at a place five or six miles away from your home on Hughes Street?
A. Yes, sir.
Q. Near where you were injured?
A. Yes, sir.
Q. You walked that distance, about five or six o'clock in the afternoon?
A. Yes, sir.
Q. And you got there around eight o'clock?
A. A little before that.

Q. And you paid a visit?

A. Yes, sir.

Q. And did I understand you went fishing?

A. No, I just took a walk down to the river where they were fishing, for a few minutes, that is all.

Q. Watching them fish for a few minutes and walked back to the house and stayed there until about half-past twelve?

A. About that.

Q. Did you have anything to eat after you had your supper that evening?

A. We had a little lunch, cup of coffee.

[fol. 78] Q. Nothing to drink?

A. No, sir.

Q. Did you play cards or anything of that kind?

A. No, sir.

Q. And you left there about half-past twelve and started walking back?

A. Yes, sir.

Q. And you got to a bridge about four miles away from your mother-in-law's place?

A. Yes, sir.

Q. A car came along and stopped and picked you up?

A. Yes, sir.

Q. In the car there were two men that you named?

A. Yes, sir.

Q. One was Mr. Harrington?

A. Yes, sir.

Q. The chief of police of Hughestown?

A. Yes, sir.

Q. He is the only policeman in town, isn't he?

A. He is not chief now, Mr. Kiendl.

Q. But he was at that time?

A. No, not at that time he wasn't.

Q. He wasn't?

A. No, not at that time.

Q. He was some time before that?

A. Yes, sir.

Q. And then there was somebody else in the car that you had worked with in the Pittston Stove Company?

A. Yes, sir.

Q. A man named Schultz?

A. Yes, sir.

Q. Who is in court now?

A. Yes, sir.

Q. And you got in the car?

A. Yes, sir.

Q. And the car continued down towards the Rock Street crossing?

A. Yes, sir.

Q. Now, as the car came towards the crossing did it at any time go on the place called Searle Street?

A. Yes, sir.

Q. And it went along Searle Street to Rock Street, did it?

A. Yes, sir.

Q. Then it turned to the right?

A. Yes, sir.

Q. And went up Rock Street one block to the railroad crossing?

A. Yes, sir.

[fol. 79] Q. Showing you Plaintiff's Exhibit 1, the map, I will ask you if you can look at it with me so that the jury can see it. This automobile that you had the ride in on the night of the accident came along Searle Street as it is indicated here at the top of this map and came to the corner of Searle and Rock Street and turned to the right?

A. Yes, sir.

Q. And went down Rock Street over the railroad track?

A. Yes, sir.

Q. And stopped on the far side of Rock Street?

A. Yes, sir.

Q. Where you got out?

A. Yes, sir.

Q. Did you ask him to get out on the corner?

Mr. Hunt: You do not mean on the far side of Rock Street, do you?

Mr. Kiendl: On the far side of the railroad crossing.

A. Yes.

Q. Did you ask to get out at the corner of Searle and Rock Street so you could walk one block down Searle Street to your home?

A. No, sir.

Q. Did you ask to get out before the car stopped at the Rock Street railroad crossing?

A. No, sir.

Q. You got out at the far side?

A. Yes, sir.

Q. As that came on you, I think you told us this morning before luncheon, you remembered trying to get your hands up but you didn't believe you got them up. Those were your own words, weren't they?

A. Yes, sir.

Q. Now sir, can you in addition to that give us some accurate estimate of when this object got near enough to you so that you realized it was an object, so that you could realize it was an object as distinguished from the darkness? How close upon you do you think it was, in your best estimate?

A. From here right to that rail there, the end of it.

Q. You mean from where you are sitting to this end of the rail?

A. Yes, sir.

Q. A matter of three or four feet?

A. Yes, sir.

Q. That train was moving?

A. Yes, sir.

Q. As a matter of fact, your next step was to be in what direction?

A. Down in Hughes Street.

Q. You were just on the verge of making your turn in to Hughes Street?

A. Yes, sir.

Q. In the opportunity that you had to see what it was that struck you were you able to make out any dimensions?

A. No, sir.

[fol. 94] Q. You only give the estimate such as you have been able to give us here?

A. Yes, sir.

Q. As a matter of fact, there is page after page of this. Did you read all this, do you remember?

A. No, sir.

Q. It was sent to you by your attorney and you were requested to sign it?

A. Yes, sir.

Q. Let us assume that you did read it.

Mr. Kiendl: I object to any assumption. The witness says he did not.

Mr. Hunt: He says he didn't read all of it, Mr. Kiendl.

Q. I will read to you this part: "* * * and that after the engine and said cars of the said train had passed your orator"—by the way, do you know what an orator is?

A. No.

Q. (Continuing:)—"* * * had passed your orator, some projection from one of the cars, either the third or fourth car of said train, projecting way out into the highway struck your orator and swept your orator backward off his feet under the wheels of the train." Now, later on, in regard to this projection—do you know what the word "projection" means?

A. Yes, sir.

Q. Here is the part that was read by Mr. Kiendl in regard to that projection: "Your orator is unable to state and your orator does not know what object the defendant permitted to project from the side of the train."

Mr. Kiendl: Not from the side.

Q. "From the said train, much less the dimension, its nature and location on the train." Then you go on to say [fol. 95] that you don't know the names of the people. Now, you have already told me that you know the purpose, that what Mr. Nemeroff was trying to do was to examine the employees of the defendant to find out what car this was and what it was projecting from the side of the train. Were you then or are you now able to give the dimensions of whatever it was that struck you first?

A. No, sir.

Q. Did you then or have you ever been or are you willing now to swear positively that it was a door?

A. No, sir.

Q. You don't feel that you can do that?

A. No, sir.

Q. Although you have an idea of what you believe it to be?

A. Yes, sir.

Mr. Hunt: I think that is all.

Recross-examination:

By Mr. Kiendl:

Q. If I am correct, you have told Mr. Hunt that you have no recollection of having read the complaint in this action.

A. No, sir.

Q. Is that right?

A. Yes, sir.

Q. Why did you tell me before lunch, when I showed it to you, that you recalled having received it and having read it?

Mr. Hunt: I have no objection at all, but may we have it appear on the record that when he showed a paper to Mr. Tompkins that Mr. Tompkins did not examine it and did not read it?

Mr. Kiendl: He looked at it and said he had received it and read it.

[fol. 96] Mr. Hunt: He looked at what? Let us be fair about it.

Mr. Kiendl: I am trying to be fair about it. I claim he looked at it and told me he had received that paper and had read it.

Q. I show you that original complaint again and ask you, Mr. Tompkins, isn't that so—before lunch?

A. Well, Mr. Kiendl, they——

Q. Isn't that so—before lunch, Mr. Tompkins?

A. Yes, sir.

Q. You saw that paper and I asked you if you read it, and you said you had.

A. Yes, sir.

Q. After lunch you told Mr. Hunt that you didn't read it at all?

A. I said I didn't recollect.

Mr. Hunt: He didn't say that; he said he didn't know, as a matter of fact, whether he had or not.

Q. You said you didn't know whether you had read it at all. Why was it that before lunch you knew that you had read it and after lunch you didn't know whether you had read it or not?

A. I had so many, they all seemed alike.

Q. How many did you have?

A. Five or six.

Q. You had three. You had your bill of complaint, you had your bill of discovery, and you had your bill of particulars. That is all you had.

A. I don't remember what I had.

Q. What made you guess you have five or six?

A. Well, I didn't know.

Q. You are just guessing about five or six?

A. Yes, sir.

Q. But you did have legal papers in this lawsuit?

A. Yes, sir.

[fol. 97] Q. In which you are trying to recover money from this railroad company?

Mr. Hunt: Objected to. Of course he is.

Q. And you did read those papers, didn't you?

A. Well, I might have read a little. I didn't read them all.

Q. You didn't read them all?

A. No, sir. I would read some of it.

Q. This paper that you signed and swore to before a Justice of the Peace, did you read that before you swore to it?

A. I don't recall, Mr. Kiendl. I might have.

Q. This is the bill of discovery (indicating)?

A. Yes, sir.

Q. This has this in it: "Borough of Exeter, County of Luzerne, Commonwealth of Pennsylvania. Harry J. Tompkins, being duly sworn, deposes and says that he is the complainant herein, that he has read the foregoing bill and knows the contents thereof, that the same is true to his own knowledge except as to those matters therein stated to be alleged upon information and belief, and as to those matters he believes it to be true." Then there is your signature and then it says, "Sworn to before me this 6th day of November, 1934," and there is the signature of the Justice of the Peace.

A. Yes, sir.

Q. Before you signed and swore to that paper did you read it?

A. Probably I did.

Q. You know you did, don't you?

A. No, sir, I am not sure.

Q. You aren't sure?

A. No, sir.

Q. Did you know that that paper that you signed and swore to before a Justice of the Peace had the complaint in [fol. 98] your action attached to it right after your signature, the second page? Did you know that?

A. Yes, sir.

Q. In the paper which you have signed, which you don't remember whether you read or not, I call your attention to this language: "That on the 29th of August your orator commenced an action at law in the United States District Court for the Southern District of New York against the Railroad Company to recover damages by filing in the office of the clerk a summons and complaint in said action and by causing it to be served, that the action is entitled 'Harry Tompkins vs. The Erie,' was duly docketed," and so forth, notice of appearance put in, served on your attorneys in said action as answer to said complaint, "a copy of which summons attached, Exhibit 1, and of which complaint, marked Exhibit 2, are annexed and made part hereof." Did you read that part of it?

A. Yes, sir.

Q. That the complaint was actually attached to the paper which you swore to before this Justice of the Peace?

A. Yes, sir.

Q. Was there anything about that part that I just read to you that you did not understand, that you read the bill and knew the contents of? Every word of that page you understand perfectly, don't you?

A. This page here (indicating)?

Q. Yes.

A. Yes, sir.

Mr. Hunt: What page is that, Mr. Kiendl?

Mr. Kiendl: That is the verification page.

Q. I think you told Mr. Hunt that you knew what the word "projection" meant.

A. Yes, sir.

Q. But that you didn't know what the word "proximity" meant.

A. No, sir.

[fol. 99] Q. You didn't know what the word "acquiescence" meant?

A. No, sir.

Q. You know what "knowledge" means?

A. Yes, sir.

Q. You know what "consent" means?

A. Yes, sir.

Q. But you don't know what "acquiescence" means?

A. No, sir.

Q. As to the proximity of the footpath to the railroad tracks, do you want this jury to understand that you don't know what that means? Look at it here—"and the proximity of said footpath to the said railroad tracks." Do you tell this jury you do not know what that means?

A. No, sir.

The Court: What do you think it means?

The Witness: Well, I have no idea.

Q. You have no idea?

A. No, sir.

Q. Who were the doctors in the hospital?

A. There was Dr. Murphy, Dr. Fleming, and the internes.

Q. Who were the internes?

A. There was an Evans, there was Bernaci.

Mr. Kiendl: Are the hospital records in court?

Mr. Hunt: We have a copy of the admissions, but the original records are not here.

Q. What doctors did you tell?

A. I told Dr. Fleming.

Q. Is he in court?

A. No, sir.

Q. You told Dr. Fleming?

A. Yes, sir.

Q. What other doctor?

A. Dr. Murphy.

Q. Is Dr. Murphy in court?

A. No, sir.

[fol. 100] Q. Those are the only two doctors you told?

A. Yes, sir.

Q. About how this accident happened?

A. Yes, sir. They were my doctors.

Q. Did you tell them you were hit by a car door?

A. No, sir.

Q. Did you tell them that you didn't know what hit you?

A. I told them there was something sticking out of the car, but I didn't know what it was.

Q. You didn't say or suggest to them that you were hit by any car door, did you?

A. No, sir.

Q. Or that you thought or assumed that you had any idea it was a car door?

A. Yes, sir.

Q. It was coming right at you?

A. Yes, sir.

Q. Why didn't you jump off to the side?

A. It was too close to me. I didn't have a chance to do anything.

Q. It was right on top of you?

A. When I took notice of it it was right on top of me.

Q. It was right on top of you?

A. It was right on top of me.

Q. By that you mean that you didn't have a chance to do anything?

A. Yes, sir.

Q. When you saw this object that was about two feet wide, how high was it?

A. It was right in front of me.

Q. I know that. How high was it?

A. You know how tall I am; five feet or something, something like that.

Q. How high was the object? It was two feet out from the car. Was it the size of a freight door, five or six feet high?

A. Something around that, about the height of that.

[fol. 87] Q. That is your best recollection?

A. Yes, sir.

Q. Let us see if we get that straight, Mr. Tompkins. The object was about two feet wide and it was about five or six feet high; right?

A. Yes, sir.

Q. You knew that that was about the width and the height of a freight car door?

A. Yes, sir.

Q. And it hit you just in the right eye?

A. Yes, sir.

Q. That is the only place?

A. Right through (indicating).

Q. It didn't hit you any other place in the body?

A. My head was all swollen. I wasn't cut in my eye.

Q. It hit you in the side of the face?

A. Yes, sir.

Q. It didn't hit your body at all?

A. My leg was cut up here and here (indicating).

Q. You don't know whether it was from that dark object?

A. No.

Q. Or whether it was from the fact that you fell down and were dragged along?

A. No, sir.

Q. You don't know whether the swelling on the side of your eye was from this object hitting your face, do you?

A. No, sir.

Mr. Kiendl: I think that is all.

Redirect examination.

By Mr. Hunt:

Q. Mr. Tompkins, I want to direct your attention to each one of the matters that Mr. Kiendl asked you about. Do you know the gentleman with whom I just spoke?

A. Yes, sir.

Q. His name is Colwell, is it?

A. Yes, sir.

Q. In regard to Plaintiff's Exhibit 3, Mr. Kiendl first on his cross examination directed your attention to what apparently is an opening in that picket fence that runs [fol. 88] from Hughes Street over to Rock Street. Do you know whether that is the entrance—you know that Mr. Colwell lives in that house, don't you?

A. Yes, sir.

Q. Do you know whether he uses what apparently is an entrance there?

A. No, sir.

Q. You don't know anything about that?

A. No, sir.

Q. You don't know, as a matter of fact, that the real entrance to his house is on Hughes Street?

A. No, sir.

Q. You don't know that?

A. No, sir.

Q. This last paper, the paper which concededly you never signed, is a legal paper. You understand that, don't you?

A. Yes, sir.

Q. Drawn by someone, either by Mr. Nemeroff or someone in his office, is that correct?

A. Yes, sir.

Q. In other words, this language in here is legal language. You don't know anything about that?

A. No, sir.

Q. Did you ever read this complaint, this paper that you did not sign? Have you any recollection one way or another?

A. No, I haven't.

Q. Mr. Kiendl asked you if you read that, and at the time he showed you this paper did you assume that you had signed it?

A. Well, I had quite a few and I don't recall just which ones I signed and which I didn't.

Q. Look at that paper and see, if you will, whether you have any recollection of ever having read it, and if you have tell us, and if not tell us so.

A. I am not sure.

Q. Have you any recollection one way or the other on whether you ever saw it or read it before, Mr. Tompkins?

A. No, sir, I don't remember.

[fol. 89] Q. I mean, can you think of any occasion why you should be reading a complaint?

A. No, sir.

Q. Does anything like that come back to you?

A. No, sir.

Q. So to get at the truth of this matter, you don't know of any occasion why you should ever be reading the complaint and you have no recollection of it?

Mr. Kiendl: I object to the form of that question, if your Honor please—"so as to get to the truth of this matter."

The Court: Overruled.

Mr. Kiendl: Exception.

Q. You may answer. Is that a fact?

A. Yes, sir.

Q. Nevertheless, let us read a paragraph or two; "That at the times hereinafter mentioned, the defendant was and still is a domestic corporation, duly organized and existing under the laws of the State of New York and operating a steam railroad both in the State of New York and in the State of Pennsylvania, and that said corporation has its principal place of business in the Borough of Manhattan, City, County and State of New York." Do you know anything about that, as a layman? As a layman, as a moulder, do you know anything about a thing like that?

A. No, sir.

Q. You had talked to Mr. Nemeroff, of course, before the action was started and had told him that the accident happened, had you not?

A. Yes, sir.

Q. By the way, before you ever knew Mr. Nemeroff had you told the doctors there in the hospital, later on, how your accident happened?

A. Yes, sir.

Q. Had you told them the same as you told his Honor and these gentlemen?

[fol. 90] Mr. Kiendl: I object to that, to what he told the doctors in the hospital being the same as he has testified to here.

The Court: Overruled.

Mr. Kiendl: Exception.

Q. Had you, Mr. Tompkins?

A. Yes, sir.

Q. As a matter of fact, if anyone asked you about your accident you told them substantially the same as you have told us here?

A. Yes, sir.

Mr. Kiendl: I object to that as improper redirect, as calling for a conclusion, and as irrelevant, incompetent and immaterial.

The Court: Overruled.

Mr. Kiendl: Exception.

Q. You had advised Mr. Nemeroff that you were on the footpath, had you not?

A. Yes, sir.

Q. In regard to the footpath, when it came to the complaint, I will read you this: "That on or about the 24th day of July, 1934, plaintiff was lawfully on a footpath near the intersection formed by Rock Street and a railroad track exclusively maintained by the defendant corporation in the Borough of Hughestown, City of Pittston, Luzerne County, Pennsylvania, and which said footpath runs parallel with and adjacent to said railroad track and said footpath furthermore has been for a long time prior to the said date herein used by the public as a means of egress and ingress to and from the streets abutting to and intersecting the said railroad track maintained by the said defendant, and that said use was with the full knowledge, consent and acqui-

escence of said defendant, and the proximity of said footpath to the said railroad tracks was fully known to the said [fol. 91] defendant, its servants, agents, employees and others." Was that your language or the lawyer's language?

A. It was the lawyer's.

Q. Do you know what it means now that I have read it?

A. (No answer.)

Q. Do you understand it now that I have read it to you?

A. No, sir.

Q. Do you know what the word "proximity" means?

A. No, I don't.

Q. Do you know what the word "acquiescence" means?

A. No, sir.

Q. Coming down to this other paper, did you advise Mr. Nemeroff, as you have here, that in your judgment, in the short time you had to see it the train was going about 30 or 35 miles an hour?

A. Yes, sir.

Q. And, sir, it did come to your attention in February that Mr. Nemeroff was going to try to examine the employees of the defendant in an effort to find which car it was and what was projecting from that car? He so advised you, didn't he?

A. Yes, sir.

Q. That was the purpose of these papers. You received in regular course some papers from his office?

A. Yes, sir.

Q. You do not know who drew them?

A. No, sir.

Q. You did not take it upon yourself to tell him how to draw them or anything of that kind?

A. No, sir.

Q. You had told him, you told me, that this train in your estimation was going 30 or 35 miles an hour?

A. Yes, sir.

Q. Did you ever claim whether that was fast or whether it was slow or whether it was medium or whether it was [fol. 92] terrific or anything of that kind?

A. No, sir.

Q. Was the choice of those words, describing that as terrific, yours? Did you have anything to do with that?

A. No, sir.

Q. Let me ask you, Mr. Tompkins: At the time the engine passed you how many more steps, or how far, any way you can describe it—how much further did you have to go as the engine was passing you before you reached the point where the two paths converged?

A. About four or five steps.

Q. So the only time that you were walking parallel to the train was this matter of four or five steps?

A. Yes, sir.

Q. So that we may get it, can you point out from where you are sitting some distance that about represents that distance we are talking about, that is, the one from the point where you were when the engine passed you until the point where you were when you were struck.

A. About from the rail to you.

Q. From the beginning of that rail to me?

A. Yes, sir.

Mr. Hunt: Could I ask one of your gentlemen or someone to estimate that distance for the record?

Mr. Kiendl: You estimate it, Mr. Hunt, and I will take it.

Mr. Hunt: Seven or eight feet.

Mr. Kiendl: All right.

Q. So far as that distance is concerned, you did walk parallel to the train?

A. Yes, sir.

Q. You had reached what point at the moment that something appeared in front of you?

A. Right where the two paths meet.

[fol. 93] Q. Did you ever swear to anybody that it was a door that hit you?

A. No, sir.

Q. As a matter of fact, Mr. Tompkins, you don't know yet just what it was?

A. No, sir.

Q. I mean you have your own idea from what you did see?

A. Yes, sir.

Q. You have your own idea what it was?

A. Yes, sir.

Q. Did you so advise Mr. Nemeroff, that you were unwilling to swear that it was a door?

A. Yes, sir.

Q. But that that was your impression, that it must have been?

A. No, I didn't.

Q. The truth of the matter is that some people come out of Hughes Street and go down here (indicating) and turn around and back up?

A. Yes.

Q. Other people, if they want to go right over, just go simply through the low land to Rock Street, is that correct?

A. Yes, sir.

Q. I was directing your attention particularly to a path. If there is any path there I want you to tell us where it is located, how long it has been there, and what it is for.

A. The only path that is there is right up against the ties.

Q. Is that path shown there in the picture? Can you see a part of it?

A. Well, you can see an impression of it right along here (indicating), very faint.

Mr. Kiendl: That is Plaintiff's Exhibit 3?

Mr. Hunt: That is Plaintiff's Exhibit 3.

Q. That path, will you show us with your hands approximately how wide it is, so that we can have it on the record.

A. Well, the foot path is only that wide (indicating).

Q. A matter of 18 inches or two feet?

A. Yes.

Q. How long has that path been there, to your knowledge?

A. As long as I can remember.

Q. Tell us who uses it.

A. Well, people going to No. 9. Mostly everybody that goes out through Rock Street that way.

[fol. 108] Q. Is that the regular way of getting out to Rock Street?

A. Yes, it is.

Q. That path adjoins the railroad ties, does it not?

A. Yes, it does.

Q. That path is up on the high ground, so to speak?

A. Yes.

Q. It is up on a level with the road bed of the railroad. What about this other ground down there? What condition is that in for walking? I mean generally speaking?

A. Well, it is in a bad shape to walk in.

Q. As a matter of fact, does anybody use the lower part for walking purposes?

A. Nobody uses it.

Q. Mr. Colwell, when you get over near your street is there any other path that you can tell us about that adjoins on to the one that you have just described, and if so where does it go?

A. There is a path comes up and goes up over the railroad and goes up to—up over Rock Street and out to Butler Breaker.

Q. That path has been there, to your knowledge, how many years?

A. As long as I can remember.

Q. And used by whom?

A. By people working at Butler's, children going to school, people going to church.

The Court: You say "as long as I can remember." How long can you remember?

The Witness: Well, as long as I can remember living there.

The Court: How long is that?

The Witness: Well, at least 14 years.

Q. Do those two paths that we have been talking about at some point adjoin? Do they become one path at some point?

A. Yes, they do.

[fol. 109] Q. Where is that point with respect to Hughes Street?

A. Well, I don't quite get your point.

Q. Is it right at Hughes Street or is it just before you get to Hughes Street where the two paths come together?

A. It is right at the railroad.

Q. How close to Hughes Street?

A. Well, I couldn't exactly tell you, but it is parallel—it is on a parallel slant from Hughes Street. It isn't straight.

Q. I know what your word means. It is not straight out from Hughes Street; it is on a slant towards what?

A. Towards Rock Street.

Q. Now, coming down to the night when this accident happened, were you in your home?

A. Yes, sir.

Q. With your family?

A. Yes, sir.

Q. In bed?

A. Yes, sir.

Q. What was the first thing that called to your attention the fact that Mr. Tompkins had been injured?

A. Well, two boys started rapping on the door.

Q. After they rapped on the door did you come down to see what it was about?

A. I went downstairs to see what was the matter.

Q. After some talk, after something was said, did you put on your trousers and go outside?

A. My wife told me not to go out.

Q. You can't tell us about it. She didn't want you to go out? She thought it was something else?

A. Yes, and she told me not to go out, that them fellows was crazy; so there was knocking on the front door and one fellow ran out the gate and was running up and down the street.

Q. Then what did you do?

A. So the other fellow was hollering that there was a fel-
[fol. 110] low run over, and I looked out the side window and I could see him.

Q. You could see whom?

A. Mr. Tompkins.

Q. Could you see who it was from where you were?

A. No.

Q. You mean you saw him afterwards?

A. No; I didn't know until afterwards.

Q. What did you do?

A. Well, I said there was an accident and I slipped my trousers on and went out.

Q. When you got there just tell these gentlemen what happened. Go right ahead and use your own words. Tell us exactly what you saw.

A. When I went out there Mr. Tompkins was laying up against the rail and his arm was off.

Q. Where was the arm?

A. The arm was lying in the middle of the road.

Q. By "the middle of the road" you mean what?

A. In the middle of the railroad.

Q. Between the two rails?

A. Yes.

Q. And his body was lying where?

A. Outside the rails.

Q. These two young men who awakened you, did they assist you in any way or did they leave?

A. No, sir; I told them to go down to Mrs. Rentford's—she lives the second house below here (indicating)—and have her call an ambulance.

Q. Is that because Mrs. Rentford is the person there that has a telephone?

A. Yes, sir.

Q. You don't have one in your home?

A. No, sir.

Q. Then they left?

A. They left there and I didn't see them after.

Q. Then what did you do?

A. I went out there and I stayed there, and people came around. Until the ambulance came I stayed there.

[fol. 111] Q. You were right there and you know where Mr. Tompkins was lying?

A. Yes, sir.

Q. You know where the arm was lying also?

A. Yes, sir.

Q. You have told us where the body was and the arm. Now I want to know where that was with respect to the place where the two paths meet.

A. Well, it was approximately—well, I couldn't say exactly, but it was between six and ten feet from where the paths meet.

Q. When you say "six and ten feet from where the paths meet" do you mean nearer to Hughes Street or nearer to Rock Street?

A. Oh, it was right—almost at the intersection of Hughes Street.

Q. Yes, but I mean when you say it was nearer—you said how many feet, about?

A. Between six and ten feet.

Q. Do you mean toward Rock Street or further beyond where the paths meet?

A. No; towards Rock Street.

Q. In other words, he was six to ten feet, lying there on the ground six to ten feet——

A. Yes.

Q. (Continuing.) —from the place where the two paths meet——

A. Yes, sir.

Q. (Continuing.) —on the side towards Rock Street?
A. Yes, sir.
Q. Of course you don't know how far he was knocked?
A. On the side towards our house.
Q. You don't know how far he was knocked back when he was struck, or anything of that kind?
A. No, sir.

Mr. Hunt: That is all, sir.

Cross-examination.

By Mr. Kiendl:

Q. Mr. Colwell, this path that you have told us about runs along the railroad track——
A. Yes, sir.
[fol. 112] Q. (Continuing.) —from Rock Street up towards Hughes Street——
A. Yes, sir.
Q. (Continuing.) You said it was a path that was right up against the ties, didn't you?
A. Yes, sir.
Q. Is that true?
A. Yes, sir, it is.
Q. That path is right up against the ties?
A. That path edges right against the ties.
Q. It isn't any two or three feet away from the ties; it is right alongside the ties?
A. Right alongside the ties.
Q. Just, you say, what you describe as a path in those pictures?
A. Yes, sir.
Q. So if you walk along that path in any direction at any time you are walking right at the edge of the ties on which the railroad rails, the steel tracks, are laid, isn't that so?
A. Well, now, you could walk in the center of that path —of course——
Q. Let us see if we understand each other.

Mr. Hunt: Let him finish, please.

A. You see, the end of the path——
Q. I did not ask for an explanation; I asked for the facts.
A. The end of that path runs up against the ties.
Q. By that you mean——

Mr. Hunt: I submit that the witness has not finished his answer.

Mr. Kiendl: You are quite correct. I am out of order, Mr. Hunt. I am sorry.

A. (Continuing.) And the path, I should judge anybody could walk on that—no, you wouldn't be up against the rails.

Q. Now you are finished, are you, sir?

A. Yes, sir. You wouldn't be up against the rails.

[fol. 113] Q. When you say the far side of the path goes up to the ties you mean that, don't you?

A. Yes, sir.

Q. When you speak of the ties you mean these things that are shown in the two exhibits you have looked at?

A. Yes, sir.

Q. Plaintiff's Exhibits 2 and 3. You mean these long bars of wood underneath the rails of the track?

A. Yes, sir.

Q. When you say the path comes up to the end of those ties you mean just that?

A. Yes, sir.

Q. There is an end of a wooden tie, and right alongside of it is this path?

A. Yes, sir.

Q. That path runs from Rock Street up to the intersecting path at Hughes Street?

A. Yes, sir.

Q. Right along the edge of those ties all the way? Right?

A. Well, now—yes, it does.

Q. Of course it does. It shows here in the picture, doesn't it?

A. Yes.

Q. The path is about two feet wide, you told us?

A. Yes, sir.

Q. And a man is about two feet wide, isn't he?

A. Yes, sir.

Q. So anybody walking up and down that path at any time, his body is right in line with the ends of those ties on one side?

Mr. Hunt: That I object to.

Mr. Kiendl: I withdraw it.

Q. Have you walked along that path?

A. I told them what I thought, yes, but I said I wasn't sure of it.

Q. That was true when you told it to the doctors and it is true today?

A. Yes, sir.

Q. You said you had no idea, when Mr. Hunt examined you about the dimensions of that object. You were sure it was two feet wide when I asked you.

Mr. Hunt: He did not say he was sure.

Mr. Kiendl: I will withdraw that.

Q. You said it was about two feet wide when I examined you?

A. That is what I said.

Q. Did you say that because if you were in the footpath it would have to reach out two feet to hit you, or did you say it because you looked at it and saw it was two feet wide?

A. That is what it was. I saw it.

Q. You told me it was about two feet wide and about the height of a car door?

A. Yes, sir.

Q. You told me that?

A. Yes.

Q. Did you tell that to the doctors?

A. No, sir.

Q. Did you tell it to anybody else at any time?

A. No, sir.

[fol. 101] Q. So there won't be any mistake about it, Mr. Tompkins, on this map (Plaintiff's Exhibit 1) let me draw a line where you say this footpath from Hughes Street to Rock Street ran along the railroad tracks. You say about two feet from the tracks and parallel to it?

A. Where the path goes along the track, do you mean?

Q. No; the path from Rock Street to Hughes Street was two feet from the track?

A. Yes.

Q. It ran straight along?

A. Yes.

Q. Would that be about where it is, where the ruler is now (indicating), assuming that is two feet?

A. Yes, sir.

Q. It is at the point where the two paths meet—the one Mr. Hunt drew in pencil and the one I just put on here in pencil—where you were, is that right?

A. Yes, sir.

Q. Almost opposite Hughes Street, if it were extended right up to the track?

A. Yes, sir.

Q. If I put an X here that will indicate the exact spot of the accident, will it not?

A. Yes, sir.

Q. I will put a circle around it. That is right, isn't it?

A. That is right.

Q. You had not started turning into the other path when you were hit? You were just at that point?

A. Just at the point.

By Mr. Hunt:

Q. Just one question: These gentlemen you spoke of, the surgeons who took care of you, you had told them about your accident before you ever had a lawyer or ever started any case at all, hadn't you?

A. Yes, sir.

Mr. Kiendl: I make the same objection to protect the situation that I did before.

[fol. 102] The Court: Both of you gentlemen opened the door pretty wide and I think it is pertinent. It is all right.

Q. Did you tell them before or after you ever had a lawyer?

Mr. Kiendl: May I have the same objection and an exception to this line, without constantly objecting?

The Court: The same ruling.

A. I told them right after it happened, as soon as I was—I didn't have no lawyers or anything then.

Q. Did you tell those gentlemen substantially as you have told us today under oath?

A. Yes, sir.

Q. Those men are living right out there, are they not?

A. Yes, sir.

Q. They are active practicing surgeons and in that hospital?

A. Yes, sir.

Mr. Hunt: That is all.

Mr. Kiendl: That is all.

WILLIAM COLWELL, called as a witness on behalf of the plaintiff, being first duly sworn, testified as follows:

Direct examination.

By Mr. Hunt:

Q. Mr. Colwell, try to keep your voice up so we can hear back here, please.

A. Yes, sir.

Q. You are a resident of Hughestown, are you not?

A. Yes, sir.

[fol. 103] Q. You have been a resident there how long?

A. Well, I am living in the house I live in now a little over two years.

Q. How long have you been a resident of Hughestown altogether?

A. About fourteen years.

Q. You are familiar with that section where the railroad track crosses Rock Street, are you not?

A. Yes, sir.

Q. As a matter of fact, for the last two years you have lived right there at the railroad?

A. Yes, sir.

Q. Your name is Colwell. Let me ask you, are you a close friend of this young man or do you know him just from living in the same village?

A. Well, I know him from being—from living around there so long.

Q. Have you ever worked in the same place or anything of that kind?

A. No, sir.

Q. I neglected to ask your business. What is it?

A. I work in the mines.

Q. That has been your life's work?

A. Yes, sir.

Q. Now, sir, I will first call your attention to the railroad track. First we have Rock Street (indicating) (Plaintiff's Exhibit 1). Do you see that?

A. Yes, sir.

Q. And the railroad track? (Indicating.)

A. Yes, sir.

Q. Between Rock Street and Hughes Street there are two houses. One, you could say, is on the corner of Rock and the

railroad track and the other is on the corner of Hughes and the railroad track?

A. Yes, sir.

Q. One seems to be about twice as large as the other?

A. Yes, sir.

Q. Do you live in either one of those houses?

A. Yes, sir.

[fol. 104] Q. Which one? The large or the small?

A. The large one right here (indicating) (Plaintiff's Exhibit 1).

Q. Take my pencil and make a "C" there indicating your initial.

A. (Witness indicated.)

Q. That is your home, is it not?

A. Yes, sir.

Q. A question arose this morning that I want you to straighten out, while I think of it. I show you a photograph that has been put in evidence, Plaintiff's Exhibit 3, and ask you if the house shown in the photograph is your home.

A. Yes, sir.

Mr. Hunt: I will show that to the jury, your Honor. (To the jury) Gentlemen, this picture that is shown here (indicating) is Mr. Colwell's home.

The Court: Is that Exhibit 3?

Mr. Hunt: That is Exhibit 3.

Q. The first thing I want to ask you about is this: there is a picket fence runs all the way from Rock Street to Hughes Street, is there not?

A. Yes, sir.

Q. About half way down that picket fence there is apparently an opening?

A. Yes, sir.

Q. Do you see it there in the picture?

A. Yes.

Q. What is that opening?

A. That is a gate.

Q. What is that a gate to?

A. Well, whenever we go up to Hughestown we always go out that gate to go up that way.

Q. When you go to Hughestown you go out that gate?

A. Yes, sir.

Q. When you speak of going up to Hughestown what do you mean by that?

A. Well, we always say "Up to Hughestown." That is more up in the upper end of Hughestown.

[fol. 105] Q. What I am getting at is this: when you say "Go up to Hughestown" do you mean in some direction which would require you to cross the railroad tracks?

A. Yes, sir.

Q. "Up to Hughestown," then, is over by the baseball field?

A. Yes, sir.

Q. And the school and those things?

A. Yes, sir.

Q. That is what you mean by "Up to Hughestown"?

A. Yes, sir.

Q. When you would be going up to Hughestown—in other words, to cross the tracks—you would use that gate that appears there in the picture?

A. Yes, sir.

Q. Now, in going into your home is that the only gate into your home?

A. No, sir; there is two other gates.

Q. The front of your house is on what street?

A. Hughes Street.

Q. Your house fronts on Hughes Street?

A. Yes, sir.

Q. I assume that naturally there is a gate in front of the house.

A. There is a gate right in front of the house.

Q. That gate is to the rear of your house?

A. It is on the side.

Q. You said there were two other gates. Where is the other gate?

A. Well, there is a gate out in front coming out on Rock Street.

Q. Do you have to go by that little house in some way?

A. Yes, sir, on the lower side of that little house.

Q. You go by the little house and then when you get to Rock Street there is no gate?

A. Yes, sir.

The Court: How far is your house from where Tompkins lived?

[fol. 106] The Witness: I lived cater-corner from where Tompkins lived at the time of the accident.

Q. Diagonally across the street?

A. Yes.

Q. Now, Mr. Colwell, I want to direct your attention first to the physical condition that exists there on that land that is between the railroad track and that picket fence that runs along the side of your house. It is agreed here, I might tell you, that there is a space in there of 35 feet between the picket fence and the railroad track. Is your mind on that now?

A. Yes, sir.

Q. Will you tell these gentlemen, first, in your own way, is there any path from Rock Street to Hughes Street? If so tell us all about it, how long it has been there to your knowledge, whom you have seen use it, and where it is located. Just tell us the whole story about it without any questions from me, please.

A. Well, from Rock Street over to Hughes Street there is a road between that railroad sign, and that is the only place you can go in there, is right between that sign and the railroad.

Q. When you say "the sign"—I will have to interrupt once in a while—you refer to what sign?

A. The railroad sign.

Q. That "Stop, Look and Listen" or something?

A. Yes, sir.

Q. When you say you go in between that sign and what——

A. The railroad tracks.

Q. (Continuing) What is it that goes in between the railroad sign and the railroad tracks?

A. There is a road goes in there?

Q. That road is used by whom?

A. Well, practically everybody that goes down in there.

[fol. 107] Q. Is Hughes Street a wide street or a narrow street?

A. Hughes Street is a narrow street. If you come up that way you can't turn around.

Q. Coming up Hughes Street is it absolutely impossible or would it be with the greatest of difficulty?

A. I don't know. I never tried it out.

Q. Did you ever see anybody try?

[fol. 121] Q. (Continuing.) —or actually there that runs along that fence?

A. No, sir, there isn't.

Q. None of any kind?

A. No, sir.

Q. You do not see the path which I show you in that picture, Plaintiff's Exhibit 2, running along your fence?

A. That isn't a path.

Q. What is it?

A. I put that there so the water would not be running in the yard.

Q. It is a level piece of ground?

A. It is dirt up to that fence, a level piece there.

Q. You can walk up on that to get to Rock Street?

A. Sure, if you have somebody help you over the ditch there.

Q. Will you show us on any of these pictures, if you can, where the ditch is that you have to have somebody help you over to get to your gate?

A. No, sir, they don't show on these pictures.

Q. Here is a great collection of pictures, Mr. Colwell. Look at them all and see if you can find the ditch that you are talking about that you have to be helped to get over.

Mr. Hunt: Mr. Kiendl, here is one you might show him.

A. Here is the closest I can show you. Do you see there (indicating)? There is a 30-inch pipe goes under the railroad. There is a deep ditch.

Q. That is this picture, isn't it, Plaintiff's Exhibit 2? That is the one that you said did not accurately show the condition?

A. Well, it doesn't. It doesn't. This is what I am trying to tell you. There is a 30-inch pipe goes under the road and you can't see it there. It comes right out right there (indicating).

[fol. 122] Q. You are indicating the place where the crossing sign is?

A. Exactly, and then there is a deep ditch runs from there right down.

Q. From there down you can't cross over without being helped?

A. No, sir.

Q. How wide is the ditch? A foot or two?

A. A foot or two I guess it is.

Q. You could step right over it without any trouble if you wanted to?

A. If you wanted to, but it is handier to go over here and get in the front gate.

Q. After you have passed over the place where this drain is underground, pass the crossing sign post, you are up near the tracks?

A. Yes, sir.

Q. I asked you if there is any reason why a man who is able to walk can't walk any place in there that he wants to.

A. Sure he can, but——

Q. You have never seen anybody do that?

A. No, sir.

Q. Not in all your life?

A. Not, not while I have been living there.

Q. Have you ever seen any railroad men working in there around the tracks?

A. Yes, I have seen men working in there around the tracks.

Q. They do a lot of switching of coal cars?

A. Yes, sir; not right—on the other side of the crossing.

Q. On the other side of the crossing there is a switch track?

A. Yes, sir.

Q. They switch cars in and out of there a great deal?

A. Yes.

Q. Railroad men are around there all the time up near the track, walking back and forth?

A. Yes, sir.

Q. It has always been so, hasn't it?

A. Yes, as long as I know of it.

Mr. Kiendl: I think that is all.

[fol. 123] Redirect examination.

By Mr. Hunt:

Q. You were asked what might not be done. You have told us what actually has been done there during the years you have been around there?

A. Yes, sir.

Q. I suppose if a person was sufficiently agile he could walk the picket fence over if he wanted to try it, couldn't he?

A. Yes.

Q. I show you a picture, a little snapshot. Look at that closely. I call your attention to where I am pointing. What is that?

A. That, sir, is that pipe that goes under the railroad.

Q. You are looking——

A. Toward Searle Street.

Q. You are looking west in that picture, are you not?

A. Yes.

Q. You see also that I am pointing now to the sign post. Am I not?

A. Yes, sir.

Q. When the automobiles or the teams drive in there, it has already been testified that you drive between the tracks and the sign post?

A. Yes, sir.

Q. The reason for that is what? Why don't they drive below the sign post?

A. You can't get over the ditch.

Q. This thing you see starting up here (indicating) ends up where?

A. On the other side of the sign post.

Mr. Hunt: I offer this picture in evidence.

Mr. Kiendl: I have no objection to that picture.

(Marked Plaintiff's Exhibit 4.)

Q. I show you another little photograph, a little snapshot. [fol. 124] If you can't see I will ask you to stand up and look at it closely and tell me whether or not you are looking squarely into that ditch and if you can see it on that photograph.

A. Yes, sir.

Q. It extends, does it not, from the sign post all the way down to your house, to your picket fence?

A. Yes, sir.

Mr. Hunt: I offer that in evidence.

Mr. Kiendl: No objection.

(Marked Plaintiff's Exhibit 5.)

Mr. Hunt: May I say just a word of explanation to the jury? (To the jury) Gentlemen, in this picture you are looking from the east—that is, the side the baseball field is on —to the west. In other words, you are looking in a direction

westerly on Rock Road in the direction indicated on the blueprint. I am calling your attention to a point right here on the blueprint. You will see right there a 30-inch pipe that runs under this track and goes clear over to this post (indicating). That is the beginning of what this young man has been telling us about.

On another little snapshot I will call your attention to—you will have to look closely—I will direct your attention right along where I am pointing my pencil, and, if you will, examine it carefully. We will get a lens if necessary before the trial is over. You will see you are looking squarely at the ditch.

Q. Now, Mr. Colwell, just one or two questions and then [fol. 125] I will be through. This path, you have estimated, was approximately two feet wide, is that right?

A. Yes, sir.

Q. During the years you have been there you have seen hundreds of people use it, have you not?

A. Yes, sir.

Q. Have you seen people on it when trains were coming by?

A. Yes, sir, I have.

Q. If one keeps to the outside of that path with a train coming against him there is at least a substantial two feet between the side of the train and the person, is there not?

Mr. Kiendl: I object to that as grossly leading.

The Court: It is leading.

Q. If a person keeps to the outside of the path what is the approximate distance between him and the side of the train?

A. Well, there is easily a foot.

Mr. Hunt: That is all. Thank you.

Recross-examination.

By Mr. Kiendl:

Q. Did you at any time, when you saw these people walking along this path with a train going by, warn them?

A. Warn them?

Q. Yes.

A. No, sir.

Q. You told me it was dangerous to walk on that path when a train was going by, didn't you?

Mr. Hunt: I object to that, your Honor. We are here to get facts and not conclusions of a witness as to what is or is not dangerous.

The Court: Objection overruled.

Mr. Hunt: Exception.

[fol. 126] Q. You told us it was dangerous to walk on that when a train was going by, didn't you?

A. Yes, it is, but I wouldn't tell nobody to get off the path when I saw a train coming.

Q. You would see human beings walk on that path with a train going by them and you would know it was dangerous and you would not warn them?

A. Supposing we take, for instance——

Q. Is that right?

A. Repeat the question.

Q. You would see human beings walking on this path with trains going by, when it was dangerous, and you would not warn them?

A. Well, the only danger there would be——

Q. Is the danger of getting hit, isn't that it?

Mr. Hunt: Do not lead a witness.

A. No, not exactly.

Mr. Kiendl: I am cross-examining. I am permitted to lead on cross-examination.

The Witness. The only danger there would be if there was something sticking out from the cars to hit them.

Q. If the cars were a little wider than the average car would that be dangerous?

Mr. Hunt: There is no evidence that any car was wider than another car, your Honor.

The Court: I sustain the objection.

Mr. Kiendl: I withdraw the question.

Q. Have you noticed that the cars vary in size and in width on railroad trains?

A. Well, I know there are some smaller and some larger.

[fol. 127] Q. You say that a man walking on the outside of this path with a train moving alongside of him would have a clearance of about a foot?

A. Yes, sir.

Q. Or perhaps a little less?

A. No; a foot at least; at least a foot.

Q. How much more than a foot, if you want to make it more?

A. Well, I couldn't say, but I know they would have a foot, anyway, because——

Q. You would say it was about a foot?

A. Yes, approximately a foot.

Q. Those trains go through there at the rate of 30, 40 and 50 miles an hour, don't they?

A. Well, they do at times, yes. I have already told Mr. Gannon they did, before this.

Q. Is there any difficulty, Mr. Colwell, with a man walking along that path, when a train comes, stepping away five or ten feet?

A. Well——

Q. Just yes or no. Is there or isn't there?

Mr. Hunt: Objected to as incompetent. It does not get us down to facts. All we are entitled to from the witness is facts, not his opinion about things.

The Court: Overruled.

Mr. Hunt: Exception.

Q. Is there any, Mr. Colwell?

A. Well, they could step out a foot or so.

Q. Or two feet or three feet or 30 feet, couldn't they?

A. Yes, they could.

By Mr. Hunt:

Q. What did you say about a Mr. Gannon?

A. I said I have already told Mr. Gannon about the train going so fast down there nights.

[fol. 128] Q. Who is Gannon?

A. Well, he is a company officer.

Q. The defendant, a railroad officer?

A. Yes.

By Mr. Kiendl:

Q. Mr. Gannon is a railroad officer, is he?

A. Well, I am sorry I said that. I don't know for sure, no. Mr. Gannon is for the railroad.

Q. He is here in court?

A. Yes, I know. That is why I have made that remark.

A. Yes, I have.

Q. If you walked along the middle of that path that is two feet wide is it or is it not a fact that your side of the body nearest to the railroad rails is about in line with the end of the ties?

A. Well, now, I don't know. I never took that much notice.

[fol. 114] Q. What?

A. I never took that much notice.

Q. Think about it now, Mr. Colwell. You have a path two feet wide coming up to the very ends of these ties and you walk along them. Don't you know that a man's body must be in line with the end of those ties in order to walk along that path?

A. Well, it certainly would be.

Q. You lived there for how many years?

A. Two years.

Q. And you saw people walking along that path, didn't you?

A. Yes, sir.

Q. You saw trains go up and down that railroad track?

A. Yes, sir.

Q. When you saw trains going up and down the railroad track did you observe that the wheels ran on the rails, the steel rails?

A. Yes, sir.

Q. Did you observe that the sides of the car and the sides of the locomotive projected over the rails? Did you ever notice that?

A. Yes, sir.

Q. Did you notice that the overhang of those cars and trains came out beyond the ends of the ties?

A. No, I didn't.

Q. You didn't notice?

A. No, sir.

Q. Did you notice how far they did come out?

A. Well, now, I never——

Q. You never measured it?

A. No.

Q. But it is the fact, Mr. Colwell, that you know right well that these railroad trains have some overhang?

A. Certainly.

Q. They overhang at least the length of the ties, don't they, down at that point and every other point?

A. No, I don't believe so.
Q. You don't believe so?
A. No, I don't.
Q. But you don't know one way or the other?
A. Not to be positive.
[fol. 115] Q. Mr. Colwell, walking along the path that you say was there, coming right up to those ties, and a train coming up, you know that your body would be awfully close to the side of that train, don't you?
A. Yes, it would.
Q. A matter of inches it would be, wouldn't it?
A. Well, I don't know, now. It would—it would be close.
Q. It would be awfully close, wouldn't it?
A. Yes, it would.
Q. And it would be awfully dangerous to walk on that path?

Mr. Hunt: That I object to, what would be awfully dangerous.
The Court: Overruled.
Mr. Hunt: Exception.

Q. It would be awfully dangerous, wouldn't it, Mr. Colwell, to walk along that path with a moving train so awfully close to you?
A. Well, it would, yes.
Q. You are testifying from what you observed as the result of living there a couple of years?
A. Yes, sir.
Q. This is not the first time that you have testified in this case, is it, Mr. Colwell?
A. No, sir.
Q. You were called as a witness by the plaintiff down in Pottstown, Pennsylvania, and testified, is that right?
A. Yes, I did.
Q. You say there are two paths—one where you have placed it right up against the ties——
A. Yes, sir.
Q. (Continuing.) —the other coming up from Hughes Street?
A. Yes, sir.
[fol. 116] Q. Do you see the Hughes Street path in the picture which I now show you, Plaintiff's Exhibit 3? Do you see it?
A. Yes.

Q. Will you point out with the end of my pencil that path.

A. Right here (indicating), right along there.

Q. Can I mark with my pencil the place that you have indicated? See that I get it accurately.

A. Yes, sir. (Indicating.)

Q. Is that it (indicating)?

A. On this side of that line it is (indicating). Here you can see for yourself (indicating).

Q. What I am trying to do is this: Have I indicated a line where you say a path from Hughes Street up to the railroad track runs or haven't I?

A. Yes, you have, but it is on this side of that line (indicating). It is on the inside of that line.

Q. Just about where that line is? It may be an eighth of an inch out or something like that? That is the path you are talking about, isn't it?

A. Yes, yes.

Q. Now, were there any other paths any place between Hughes Street and Rock Street other than the path that I have marked with a pencil and the path you say is two feet wide running along the edge of these ties?

A. Between Rock Street and Hughes Street?

Q. Yes.

A. No, sir.

Q. How far would you say it is from Rock Street to Hughes Street? A matter of 150 feet or so?

A. About 100 feet.

Mr. Kiendl: We agree it is about 115 feet.

Mr. Hunt: Yes, from the——

Mr. Kiendl: Nearest point of Rock Street to the nearest [fol. 117] point of Hughes Street, is about 115 feet.

Mr. Hunt: Yes, about.

Q. Now, take that piece of land, Mr. Colwell, it is about 115 feet long and about 35 feet wide between Hughes Street, Rock Street, the railroad ties and the fence. In the two years that you have lived at the house that you have indicated on the map had you ever seen anybody at any time walk in any part of that territory except on the two paths that you have told us about?

A. No, sir.

Q. Never once?

A. No, sir. That is too rough walking.

Q. Let us see, Mr. Colwell; see that I get this straight. You have never seen a soul——

A. No, sir.

Q. (Continuing.) —walking over any other part of that whole territory?

A. No, sir.

Q. Except the path along the ties and the path to Hughes Street?

A. Yes, sir.

Q. Do you mean that?

A. I sure do.

Q. You understand that you have told Mr. Hunt here—I thought you did—that you walked out of your gate across part of that territory?

A. Well, that path I do.

Mr. Hunt: May it please the court, Mr. Kiendl has framed his question wrong. He is talking about walking along. He says "walking along from Hughes Street to Rock Street."

Mr. Kiendl: No, I didn't, but I will get it straight. I do not want to take any unfair advantage. I will repeat the question.

[fol. 118] Q. Mr. Colwell, from Hughes Street to Rock Street, about 115 feet running along the railroad track and about 35 feet wide from the edge of the ties to the fence in front of your place, did you ever see anybody walking in any part of that territory except on the two paths?

A. And the path coming out of our house.

Q. Oh, there is another path there, is there?

A. There is a path coming out of the side gate.

Q. Is that a path that you can see and walk along?

A. Yes.

Q. And know that it is a path?

A. Yes, sir.

Q. A well defined path?

The Court: Pardon me. You testified to two paths so far—one path along the ties and the other path along Hughes Street; is that right?

The Witness: Yes, sir.

The Court: Is there a third path besides those two?

The Witness: Yes, there is. It is marked on that picture.

Q. You haven't told us anything about the path until I directed your attention to it.

A. Well, I——

Q. You forgot that?

A. I did. I understand that it was there.

Q. That path was shown on Plaintiff's Exhibit 3 by the broken ink line from your gate up toward the path that runs along the edge of the ties?

A. That is it.

(Mr. Kiendl indicated to the jury on the picture.)

Q. Now we have three paths, Mr. Colwell. Were there any others in there?

A. Yes, sir.

[fol. 119] Q. Where were they?

A. Right here, going up from——

Q. No; I am asking you about a certain restricted piece of territory. Are there any other paths in there?

A. No, there is no more in there.

Q. Then, I ask you, Mr. Colwell, if you ever saw anybody take a step, walk a step, any place in that territory except on the three paths that you have now told us about.

A. No, sir, I haven't.

Q. Did you ever see anybody walk alongside of your fence?

A. No, sir.

Q. Is there any reason why you could not walk alongside of your fence if you wanted to?

A. Well, you could walk alongside of it, but you would roll down and under.

Q. You would roll in under the fence?

A. Exactly.

Q. You don't mean that, do you?

A. I sure do. Here is the ditch right here (indicating), see, and down here there is a bank goes right under the fence.

Q. Now, you asked me if I saw the ditch?

A. Yes.

Q. There are some rocks right up against the fence, aren't there?

A. Yes.

Q. And a drain that runs in there?

A. Yes, sir.

Q. But come out two feet from the fence. There is no reason why you couldn't walk in there, is there?

A. It is pretty rough there.

Q. It is like if is shown in this picture?

A. No, sir; it is rougher than that.

Q. Do you mean that the territory we are talking about is not correctly shown in this picture, Mr. Colwell?

A. It is not, no, sir.

Q. You have been a good neighbor of the plaintiff for some years?

A. I have been a neighbor of the plaintiff for a long time.

[fol. 120] Q. Did you hear him testify?

A. No, sir. Only right here, yes.

Q. You say that this picture does not show the condition of that 35 feet between Rock and Hughes Street——

A. No, sir.

Q. (Continuing.) —as it was at the time of the accident?

A. No, sir, it doesn't show it very plain there.

Mr. Hunt: At this time could we have the date when these pictures were taken?

The Court: The picture that you have shown, Mr. Kiendl, is Plaintiff's Exhibit 3?

Mr. Kiendl: Yes, your Honor.

Q. How about this picture, Plaintiff's Exhibit 2? Does that show the condition of that territory we have been talking about as it was at the time of the accident?

A. No, sir.

Q. Look at these two which I now show you.

Mr. Kiendl: I ask to have them marked Defendant's Exhibits A and B for identification.

(Marked Defendant's Exhibits A and B for identification.

Q. (Continuing.) Those are pictures looking up toward the curve in the railroad track. Do they show the conditions as they were at the time of the accident?

A. No, sir.

Q. They do not either?

A. They don't. That ground down in there is awfully rough all along in through there.

Q. There isn't any path that you can see in any pictures——

A. No, sir.

Q. You told us, I understand, that railroad trains were going too fast through there?

A. That Ashley freight, yes, sir.

Q. The Ashley freight?

A. Exactly.

Q. You told Mr. Gannon that the Ashley freight goes through there too fast?

A. Sure it does.

Q. You have seen it go through night after night?

A. I have seen it going through and I have seen it coming back, yes.

Q. Quite a few times?

A. Quite a few times since I am living there.

Q. How fast have you seen the Ashley freight go through there at night?

A. Well, what night?

Q. Any night.

A. Well, I drove a car for the last fourteen years and I know 30 miles when I see it, and I have seen that Ashley go 40 easy.

Q. 40 easy toward Ashley?

A. Yes, sir.

Q. It is a big train usually, isn't it?

A. Well, at times, yes, and at times he has a pusher.

Q. When you have seen it go 40 miles an hour have you seen it with a pusher?

A. No, sir—well, no, I don't know. The pusher goes off before he gets to our house sometimes.

Q. But you have seen that train go over this territory with two locomotives on, one pulling and the other following?

A. Yes.

[fol. 129] Q. Living there, you know that the reason why they had a pusher on was because the grade was all upgrade?

A. Well, there is a grade until you come almost to our house, but it is a slight grade.

Q. As a matter of fact, there is a grade until you come over Rock Street, isn't there?

A. No.

Q. There isn't?

A. No, I don't believe so. Maybe there is, but I don't think so.

Q. But there is a grade almost to your house?

A. Yes.

Q. So a train coming from Avoca, the Ashley Special, is going uphill?

A. Yes.

Q. And it comes up and proceeds by the point where this accident happened?

A. Yes.

Q. You have seen freight trains with pushers, Ashley Specials, going up there at 40 miles an hour?

A. Yes, I did.

Q. You were so alarmed about it that you talked to Mr. Gannon?

A. When Mr. Gannon was there the morning after the accident I told Mr. Gannon the same as I am telling you, that that train—I don't say the night of the accident, because I didn't hear it, but I have saw that train going that fast.

Q. What you told him was that some time you saw the Ashley Special go 40 miles an hour?

A. Yes, exactly.

Q. You complained to him about that?

A. Not exactly complained about it.

Q. You told Mr. Hunt you complained to the railroad about the speed of this train?

A. No, I didn't say I complained; I said I told Mr. Gannon.

Mr. Hunt: I object to counsel thinking he is going to get anywhere by shouting at the witness.

[fol. 130] The Court: It is proper cross-examination.

Mr. Hunt: Let us quote this record correctly. He did not say he made any complaint; he said he told Mr. Gannon. I didn't ask him the circumstances when and where.

The Court: The jury will recall what he said.

Q. You told Mr. Gannon at one time that the train was going 40 miles an hour?

A. Yes.

Q. Do you think it was too fast?

A. Yes, I do, for that type of rail.

Q. What is the matter with the rail?

A. Well, I will tell you what is the matter. If you fellows would go down there and look that over you would see it has been reconditioned——

Q. Did you ever see me down there looking it over?

A. No, but I say if you did you would not ask that question.

Mr. Kiendl: I submit we do not want a speech from the witness as to what we should have done.

The Court: You must confine your answers to questions. Listen to counsel.

The Witness: I am sorry.

Q. You have told us that you have told Mr. Gannon that the trains were going too fast because of the rails?

A. Yes, sir.

Q. Is that right?

A. Yes, sir, and that is right on a curve and our house is right there at that curve, and I would hate to have them come through that at night.

Q. You would hate to have them go through your house at night?

A. Yes, sir.

[fol. 131] Q. Are you being serious, sir?

A. Well, no——

Q. Are you being serious?

A. Well, certainly I would hate to have that engine jump the road and go through our house.

Q. Has the engine ever jumped the road down there?

A. No, but there is always a first time.

Q. These are the rails that you are talking about, that you see on these pictures (indicating)?

A. Them are the same rails, yes, sir.

Q. Those are the rails that go right past your house (indicating)?

A. Yes, sir.

Q. Here is the curve coming down here, Plaintiff's Exhibit 2 (indicating)? That is the one?

A. That is the curve, yes, sir.

Q. You were a little concerned for fear that this train coming 40 miles an hour might jump off the rails and go into your house?

A. Yes, sir.

By Mr. Hunt:

Q. Let me ask you first, in the light of these questions: Did you ever make a complaint to Mr. Gannon?

A. No, I didn't. I didn't make a complaint. He was there the morning after the accident.

Q. This is on a curve?

A. Yes.

Q. Your house is at the end of the curve?

A. Right at the end of the curve.

Q. Mr. Kiendl has just asked you if you thought it was too fast and you told him you did, for that particular condition?

A. Yes.

Q. You never told Mr. Gannon that or anything of that kind? Did you tell Mr. Gannon about that?

A. I didn't make a complaint to Mr. Gannon about that. I just said (laughing) pardon me, I just said that they went too fast.

[fol. 132] The Court: Aren't we going a little far afield?

Mr. Hunt: I thought my friend did. I tried to stop it. I have got to straighten it out every time.

Q. The next morning Mr. Gannon was right there on the job?

A. Yes, he was.

Q. He is the claim adjuster for the railroad, or don't you know?

A. I didn't know. I thought he was an officer.

Q. You went out to tell him what you knew about it the very next morning while the injured man was over in the hospital?

A. Yes.

Q. You told him what you knew about it?

A. I told him what I knew about it.

Q. You told him what you told these gentlemen?

A. I told him what I told these gentlemen. I told him what I told that gentleman there (indicating).

Q. What gentleman is that?

A. Mr. Glass.

Q. That is another gentleman?

A. Yes.

Q. At that time the next morning, keeping in mind the next morning when Gannon was there, did he ask you how fast the train usually went through there?

A. No, I don't believe he did. It has been a long time ago and I can't say for certain.

Q. You remember that something was said about the speed of the train, do you?

A. Yes.

Q. Did you tell him at that time you had seen it go through at least 40 miles an hour?

A. Yes.

Q. Did Gannon make any claim at that time that this train was going around the bend at ten miles an hour?

A. No.

Q. He didn't make any claim like that?

A. No.

Q. Did you ever see it go around the bend at ten miles an hour?

A. Yes, I have.

[fol. 133] Q. Is that the usual thing or not?

A. No, it is not.

By Mr. Kiendl:

Q. Mr. Colwell, when you made this statement to Mr. Gannon was there a stenographer there, like this stenographer, taking down the questions that were asked you?

A. No, that morning there was nobody there, only Mr. Gannon.

Q. Mr. Gannon didn't ask you about the speed of the train, did he?

A. No, because I couldn't answer him, because I didn't hear him.

Q. He didn't ask you about the speed of the trains on other nights going through there?

A. I just told him.

Q. "Your Ashley Special goes through too fast"?

A. I did, yes.

Q. You did that with the intention of complaining about the speed of that train, did you?

A. I did, yes, sir. Well, deep down in my heart I did.

Mr. Kiendl: That is all.

Edward M. Harrington, called as a witness on behalf of the plaintiff, being first duly sworn, testified as follows:

Direct examination.

By Mr. Hunt:

Q. Mr. Harrington, you are a resident of Hughestown?
A. Yes, sir.
Q. The home of Bucky Harris?
A. Yes, sir.
Q. What is your business? What do you make your [fol. 134] livelihood from?
A. Well, at the present time I am employed in a supervising capacity on the W. P. A.
Q. Prior to that time your work had been what?
A. Why, a miner.
Q. At one time you did hold a public office there, Chief of Police?
A. Yes, sir.
Q. This whole territory we are speaking of is how large a place? I mean, what is the population of Hughestown Borough?
A. Well, I judge it to be about 2800.

The Court: How long are you a resident of Hughestown?
The Witness: Why, I will be a resident of Hughestown Borough 32 years the 14th of this coming January.

Q. Now, sir, you have been here in court while the trial has been progressing, have you?
A. Yes, sir.
Q. Coming right down, I want to ask you with respect to the condition between Rock Street and Hughes Street, what was there used there by pedestrians, if anything, and how long has it been there and who uses it?
A. There is a foot path runs from Rock Street to Hughes Street. It has been used ever since I can remember.
Q. That would be over a period, to put it safely, of how many years?
A. Well, I could safely state 20 years.
Q. That foot path, you say, starts at Rock Street and runs over to Hughes Street?
A. Yes, sir.
Q. Hughes Street; is that a dead end street?
A. Yes, sir.
Q. Is that footpath down in the low ground or is it up [fol. 135] on the level with the railroad tracks?

A. Why, I imagine it is just about level with the ties. It sets off to the left of the ties.

Q. It is about how wide? Show me with your hands.

A. Probably two feet.

Q. Indicating, I should say, at least two feet?

A. Yes, sir.

Q. That path runs along at the end of the ties, does it not?

A. Yes, sir.

Q. Does that path join with another other path, and if so where?

A. Yes, sir, there is a path coming from Hughes Street that crosses that diagonally and crosses the railroad.

Q. Crosses the railroad track and goes where?

A. Why, it goes to Rock Street and crosses Rock Street and goes off over what is known as Weitz Hill and comes down at Center Street in Hughestown Borough.

Q. Those two paths, Mr. Witness, if you could tell us, join about where; I mean approximately without being too accurate?

A. Well, I would judge at the upper end of Hughes Street, right at this end of it (indicating); that is, going from Rock Street to Hughes Street as you meet Hughes Street.

Q. Going back over the path that runs from Rock Street to Hughes Street, over this period of years that path has been used by whom, to your knowledge?

A. I have used it in my capacity as Chief of Police in making the rounds of the Borough.

Q. What other people besides yourself have used it?

A. Miners going to work have used it for years, and people—children going to school; even going to the town hall they use it.

Q. That has been going on for years, hasn't it?

A. Yes, sir.

[fol. 136] Q. The path that leads across the tracks diagonally, the one that joins up with that, has been used for years by whom?

A. By the miners. The school children cross that to go to school too.

Q. Is there a baseball field over here in the lot (indicating)?

A. Yes, sir.

Q. Something has been said here by Mr. Kiendl on cross-examination as to whether it was possible to use the low land down near the picket fence. Of course anything would be possible, would it not?

A. It is possible.

Q. What we want to know is the fact of the matter. People coming from Hughes Street to Rock Street travel on what part?

A. They always travel on the path.

Q. Of course the condition of the lower land was not always the same day in and day out?

A. No; it is subject to washouts of the rain. It is very rough terrain.

Q. You are familiar with the ditch that runs from the post, that is, that railroad signal, that post (indicating), down to the picket fence? You know there is a ditch?

A. I am not familiar with it at the present time.

Q. I beg your pardon?

A. Not at the present time. I haven't seen that part of the country in a couple of years, but in my capacity as Chief of Police I was very familiar with it at that time.

Q. Now, sir, on the night of this accident you had been where?

A. We were at Harvey's Lake.

Q. Where is that?

A. Harvey's Lake. It is in Lucerne County; I judge it should lie about 20 miles northwest of Wilkes-Barre. I believe that would be northwest.

Q. With you at the time was whom?

A. Wilbert Schultz.

[fol. 137] Q. Is he also a resident of this little community?

A. Yes, sir.

Q. On your way home from the lake did you eventually come to Rock Street?

A. Yes, sir.

Q. Prior to that time what would you have been on? Searle Street?

A. Yes, sir.

Q. Tell these gentlemen in your own words if on your way home you saw anybody on the street, or on the road, or where was it? Tell us just what happened, briefly.

A. Yes, sir. In crossing the Fort Jenkins Bridge—Mr. Schultz was a personal friend of Mr. Tompkins, and Mr. Tompkins was walking over the bridge, and as he passed

A. Yes, sir.

Q. And you had seen people walking up that slope on that path, hadn't you?

A. Well, the only one I had ever seen was Bill.

Q. That is Bill Colwell, the witness who was on the stand before you?

A. Yes, sir.

Q. And he is the only man you ever saw walk up that path?

A. Yes, sir.

Q. But there was a path there well worn so that you could see it with your eyes?

A. Yes, sir.

Q. And you only saw one man in two years walk on it?

A. Yes, sir.

Q. Between that path and the Colwell gate up to the ties the ground slopes up, doesn't it?

A. Yes, sir.

Q. About two or three feet or something like that?

A. Better than that.

Q. How much?

A. I should judge about four feet.

Q. About four feet?

A. Yes, sir.

Q. And that slope up through there from the ties down to the fence, that runs along—you know the fence I mean?

A. Yes, sir.

[fol. 147] Q. The slope is about four feet, isn't it?

A. Yes, sir.

Q. Had you ever seen anybody walk in any of that territory at any time?

A. No, sir.

Q. Except on the three paths that you have told us about?

A. Yes, sir.

Q. I understood you to tell Mr. Hunt that you had seen automobiles?

A. Yes, sir.

Q. Come in from Rock Street by passing between the railroad crossing near to the railroad track?

A. Yes, sir.

Q. And then going down the slant toward the fence?

A. No, not going down the slant toward the fence; they run along the top of the bank and down toward Hughes Street, which I have done myself.

Q. The automobiles run right along where this path is located?

A. Yes, sir.

Q. Didn't you just tell Mr. Hunt that the autos would pass the sign and then work down to the fence after they had passed it?

A. No, I did not.

Q. Well, you had never seen any automobiles down near the fence at any time, had you?

A. No, sir.

Q. I show you Defendant's Exhibits A and B for identification. Had you ever seen a condition of that kind during the two years that you lived there, with automobiles down near the fence and men standing there?

A. No, sir.

Q. Never?

A. No, sir.

Q. Can automobiles go on that ground below the path?

A. No, sir.

Q. Do you mean to say after an automobile enters beyond that point where the crossing sign is, an automobile can't operate down to that fence?

A. It can operate, but not saying how it can operate down there.

[fol. 148] Q. It would be a little bit more convenient, and so forth, to keep up near the track?

A. Yes, sir.

Q. And they did keep up near the track, didn't they?

A. Yes, sir.

Q. You have seen trucks in there?

A. Yes, sir.

Q. And pleasure cars, all kinds of automobiles in there from time to time?

A. Yes, sir.

Q. And the wheels followed—the wheels of all these trucks went right along that path, didn't they?

A. No, they would not hit the path.

Q. Where would they go?

A. I should judge the path would be in between them.

Q. The path would be between the wheels?

A. Yes, sir.

Q. So that you say the wheels on these automobiles that you saw running alongside of this railroad track would be between the path and the edge of the ties?

A. Yes, sir.

Q. Is that right?

A. Yes, sir.

Q. But don't you know the path was right up to the edge of the railroad ties along that track?

A. It is not right up against them. In some places it is and some places it is a foot away, two feet away.

Q. You heard Mr. Colwell testify yesterday, you heard Mr. Hunt——

A. Yes.

Q. You heard Mr. Harrington testify yesterday?

A. Yes, sir.

Q. And you heard the plaintiff testify?

A. Yes, sir.

Q. Now, Mr. Colwell has testified that they both went right along the edge of the ties. You heard that, didn't you?

Mr. Hunt: Objected to as incompetent, irrelevant and immaterial.

[fol. 149] The Court: Objection overruled.

Mr. Hunt: Exception.

Q. You heard the testimony that it ran right up against the ties, didn't you?

A. Yes, sir; in some places.

Q. Did he say "in some places"?

A. I just don't recall what he said.

Q. Did you hear Mr. Harrington testify yesterday that the path runs along the end of the ties?

A. Yes, sir.

Q. Now, you say it runs along the end of the ties in some places?

A. Yes, sir.

Q. And then it curves in and out a foot or two feet or something of that kind?

A. Yes, sir.

Q. It is not a straight path running along the ties then, according to your impression?

A. It is a straight path, but it has places if varies a foot away from the ties, two feet, three feet, right along.

Q. Does this picture, Plaintiff's Exhibit 3, show the path that you are talking about, the end of it down near Hughes Street?

A. Yes, sir.

Q. And is that path there at Hughes Street shown in the picture, the path that you are talking about?

A. Yes, sir.

Q. And does it come right up to the end of the ties?

A. Sure it does, but what about here, what is here (indicating)?

Q. Are you asking me?

Mr. Hunt: Yes.

The Witness: It is away from here.

Mr. Kiendl: I submit, if your Honor please, that the witness is supposed to answer questions and not to ask them.

[fol. 150] The Court: Yes, Mr. Witness, you must answer counsel's question.

Q. At the point I have indicated, at the end of Hughes Street, we agree that you say that the path is right along the edge of the ties?

A. I would not say it is along; in some places it is a foot away or two feet away.

Q. The point I just pointed out to you in this picture, Plaintiff's Exhibit 3, you just told us it was right on the ties, didn't you?

A. Well, here it comes up to the ties, this path coming from Hughes Street.

Q. That is the point I am directly interested in, the junction point of the two paths, the one coming from Hughes Street and the one coming from Rock Street; they join right alongside the ties; don't they?

A. Yes, sir.

Q. As shown in that picture, somewhere right in here they join, right alongside the ties as shown by the black mark on this picture; isn't that so?

A. Yes, sir.

Q. And it continues right along the edge of the ties as shown in the picture, doesn't it?

A. Yes, sir.

Mr. Kiendl: Mr. Hunt, you asked me yesterday to get the date when the two pictures were taken.

him he says, "There is Harry Tompkins." He says, "We will stop and pick him up"; so we stopped and picked him up.

Q. Schultz called to Tompkins, did he?

A. Yes.

Q. Mr. Tompkins got in your car and you proceeded on your way?

A. Yes, sir.

Q. You let him out where?

A. Just above the crossing on Rock Street.

Q. When you say "just above the crossing on Rock Street," I think it will be conceded that it was just as you went over that crossing.

A. Yes.

Q. Coming up that crossing there is quite a grade?

A. Yes.

Q. The path starts there right alongside the track?

A. Yes.

Q. You stopped right there at the tracks and he stepped out?

A. Yes, sir.

Q. You said goodnight and went on your way?

A. Yes, sir.

Q. The next you knew that Harry had been struck was when? The following day?

A. The following morning, yes, sir.

[fol. 138] Q. You have no interest in the case at all?

A. No, sir.

Cross-examination.

By Mr. Kiendl:

Q. Did the railroad come to see you about the case, Mr. Harrington?

A. Why, yes, they did, I believe, the two gentlemen in the house there, yes.

Q. You refused to tell them anything?

A. I told them that if my testimony was wanted I would give it.

Q. They asked you to give it and you refused to give it to them, didn't you?

A. I believe I did. I don't believe I even asked them to sit down.

Q. You know you refused to give them any information when they called and asked you what you knew about this accident?

A. I told——

Q. Listen to me. You refused to give them any information when they asked you what if anything you knew about this accident; isn't that so?

A. I am answering it the best way I can. I told you that I told them that if my testimony was wanted I would give it in court when the time came.

Q. They said to you in substance, "So you refuse to tell us anything about it" and you said, "I do"? Isn't that what occurred?

A. Well, am I being tried? I don't understand.

Q. Are you being tried? I am trying to get some information from you as to what you said and did. Did the railroad come to you and ask you for some information and did you point blank refuse to give them any?

A. Just as I told you. I told them that I would give it if I were called as a witness.

Q. Didn't they ask you to give it to them?

A. In other words, I refused, if that is what you mean, yes, sir.

[fol. 139] Redirect examination.

By Mr. Hunt:

Q. You told them you would tell what you knew about this when you got to court, didn't you?

A. Yes, sir.

Mr. Hunt: That is all.

By the Court:

Q. What position did you hold at that time? Were you Chief of Police at that time?

A. No, sir, I was not.

Q. Do you know Mr. Tompkins?

A. Well, I know him.

Q. How long do you know Mr. Tompkins?

A. Probably 15 or 18 years.

Q. Are you on intimate terms with him?

A. Well, I don't see him. We are not intimate; just that I knew him.

By Mr. Hunt:

Q. Did you ever visit his home or did he ever visit yours or anything like that?

A. No, sir, I have never visited his home.

Q. Do you meet socially or in business in any way at all?

A. No, sir.

Q. You know him as a citizen of Hughestown?

A. Yes, sir.

Recross-examination.

By Mr. Kiendl:

Q. This path that you told us about runs right along the end of the ties, is that right?

[fol. 140] A. Well, it does—it doesn't run along right at the end of the ties. I have walked the path. There is lots of room.

Q. There are two feet there?

A. Yes.

Q. You have the end of the ties and then you have the end of the path that runs two feet wide?

A. Yes, sir.

Q. Then into this rough terrain that you have described?

A. Yes, sir.

Q. Can you walk on the rough terrain?

A. Well, I could, yes, if I had to.

Q. So far as you observed that rough terrain, anybody else could walk on it?

A. Well, it isn't very comfortable, I will say that.

Q. I didn't ask you whether it was comfortable or not, sir; I asked you whether it was walkable?

A. Yes, sir, it can be walked on.

Q. That is the terrain shown in this picture, Plaintiff's Exhibit 3, isn't it, between the railroad track and the fence?

A. Yes, sir, that is a picture of it as far as you can see.

Mr. Kiendl: That is all.

The Court: (To the jury) Gentlemen of the jury, please do not discuss this case among yourselves or with anyone else. Try to be here promptly at ten-thirty tomorrow.

(Adjourned to October 6, 1936, at 10.30 a. m.)

[fol. 141] New York, October 6th, 1936, 10:30 a. m.

Trial resumed.

ALOYSIUS THOMAS MCHALE, called as a witness on behalf of the plaintiff, being duly sworn, testified as follows:

Direct examination.

By Mr. Hunt:

Q. Mr. McHale, you are a resident of Hughestown, are you not?

A. Yes, sir.

Q. And you have been a resident of that village for a period of how long?

A. Three years.

Q. Mr. McHale, so that we can locate your residence, I would show you a blueprint and ask you to study that for just a moment, and I will call to your attention the railroad track and Rock Road after it crosses the track; we see some houses. Is your house shown there?

A. Yes, sir; that is it (indicating).

Q. And will you take and mark that with the letter M, please?

A. Yes, sir (witness complies).

Q. Your house is the small house in the corner, is it not?

A. Yes, sir.

Q. Along side the home of Mr. Colwell, who was on the stand yesterday?

A. Yes, sir.

Q. Then we can see just a bare corner of it in the picture?

A. Yes, sir.

Q. Now then, I would like to get right down to the question and direct your attention to that land that lies between Rock Street and Hughes Street and this space that exists between the picket fence and the railroad track; I am directing your attention to that.

A. Yes, sir.

[fol. 142] Q. Now first in regard to that, the question was raised here yesterday afternoon as to whether or not there is a ditch along Rock Street extending about as far as the railroad sign which we see in this picture.

A. Yes, sir.

Q. That railroad sign. Can you tell these gentlemen whether or not there is a ditch there?

A. There is a ditch.

Q. And somebody did give us roughly its dimensions.

A. There is a ditch there coming down from the railroad sign, which ditch is about two feet wide and is very deep and very dangerous to walk over it.

Q. As a matter of fact, did you ever see anybody, in the years you have been there, jumping the ditch or trying to get over it in that fashion?

A. No, sir; nobody would try to get over it.

Q. And the teams and the automobiles that go through, when they short-cut to reach Rock Street or come in from Rock Street and go over to Hughes Street, they have to pass, when they start on this ground, they have to pass where?

A. Between the sign and the railroad track.

Q. And then these tracks and the ruts, do they stay up nearer the railroad track after they pass beyond the pole, or do they work their way down toward the picket fence?

A. Yes, sir; down toward the picket fence.

Mr. Hunt: Now, I am trying to shorten this, your Honor.

Mr. Kiendl: I don't mind your leading until I object.

Mr. Hunt: All right; I will just lead.

Q. You heard the witnesses here in court yesterday, did you not?

A. Yes, sir.

[fol. 143] Q. You heard the description of the two paths given by the different witnesses?

A. Yes, sir.

Q. Are you familiar with those paths?

A. Yes, sir.

Q. Have they existed since you lived in Hughestown?

A. Yes, sir.

Q. And you have seen what people in the neighborhood and what citizens use these paths regularly?

A. I have used them myself and I have seen men going to Butler's Colliery, church, and children going to school.

Q. And when the pedestrians use that part of the land, what do they use, the path, or do they use the lowland where the ruts and ditch were?

A. They use the path.

Q. When was the first, Mr. McHale, that you knew of Mr. Tompkins' accident?

A. I think it came to my attention the night that it happened.

Q. Yes.

A. Yes. I was in bed and Mr. Colwell woke me up, so I just slipped on a pair of trousers and went out.

Q. And had they removed Mr. Tompkins before you got there or not?

A. No; I was right there after Mr. Colwell; he was still there.

Q. Will you tell us with respect to the place where these two paths merged, come together, where was he lying with respect to that place?

A. From the paths?

Q. Yes; from where the two come together?

A. I should judge six or eight feet.

Q. Which way, toward Rock Street or the other direction?

A. The other way.

Q. What?

A. Towards Hughes Street.

Q. You mean he was lying nearer Hughes Street?

A. Yes, sir.

[fol. 144] Q. But I mean you say six or eight feet; what do you mean by that, beyond the place where the paths converge?

A. Yes.

Q. But back towards——

A. Back towards this way it was (indicating).

Q. When you say back towards this way, that doesn't mean anything.

A. Back towards Rock Street.

Q. Yes, back towards Rock Street.

A. Yes.

Q. And his arm—that portion of his arm which was amputated at that time was lying where?

A. In the center of the railroad track.

Q. You have no interest in this matter in any way?

A. No, sir.

Mr. Hunt: That is all.

Cross-examination.

By Mr. Kiendl:

Q. You have known Mr. Tompkins for some years?

A. No, sir.

Q. Did you know him at all?

A. Just to bid him the time of day.

Q. Just to bid him the time of day?

A. Yes, sir.

Q. For two years you lived at the corner of Rock Street, and you knew Mr. Tompkins lived within about a block of you, didn't you?

A. Yes, sir.

Q. You saw him in that neighborhood from time to time, didn't you?

A. I have seen him, yes.

Q. Wasn't it the fact, Mr. McHale, that when you actually got to the place where Tompkins was after this accident had happened, his body was about 75 feet nearer to Rock Street?

A. I just could not say the distance.

Q. Well, didn't you point out the spot at one time to the railroad representatives where you saw his body?

A. I can show you where I saw it, yes, sir.

[fol. 145] Q. And didn't you show it to them, the very spot?

A. I and Mr. Colwell talked to them; yes, sir.

Q. And the railroad representative was Mr. Dineen, was it?

A. What is that name?

Q. Dineen.

A. Yes, sir.

Q. And he came to you and asked you what you knew about this accident?

A. Yes, sir.

Q. And you told him that you came out after the accident and found this man or boy at a certain spot on the railroad track, and you pointed to it, didn't you?

A. Yes, sir.

Q. And that was about 75 feet?

A. That I could not say, just how far it was from the corner.

Q. Did you tell Mr. Dineen and the other man about the paths you had just told us about?

A. I just could not recollect it.

Q. You know you didn't say anything about any paths then, don't you?

A. I guess I didn't.

Q. Now, Mr. McHale, you lived in that corner for two years before the accident?

A. Yes, sir.

Q. And were you one of the miners down in that——

A. No, sir.

Q. What was your business?

A. I am a salesman.

Q. And you worked in the daytime?

A. That is right.

Q. And you were home at night?

A. Yes, sir.

Q. Most of the time during those two years, weren't you?

A. Yes, sir.

Q. And you were home Saturdays, Sundays and holidays, I presume.

A. Yes, sir.

Q. And you watched people walk around there?

A. Yes, sir.

Q. In the neighborhood?

A. Yes, sir.

Q. And you say there were two paths?

A. Yes, sir.

[fol. 146] Q. Are you sure there were only two?

A. Well, there was another path leading from Colwell's gate that he used.

Q. And that path went from Colwell's gate up the slope to the railroad ties?

A. Yes, sir.

Q. In a straight line, didn't it?

A. No, sir; not in a straight line.

Q. Well, practically a straight line? Practically a straight line?

A. Yes, sir.

Q. A line such as shown by the broken pen marks on this Plaintiff's Exhibit 3 from the gate to the track?

A. Yes, sir.

Q. Is that where you mean the path was?

A. No, sir.

[fol. 160] Q. Now, assuming—have you ever had any experience in amateur photography of any kind?

A. No, sir.

Q. Well, you would know that you have to be pretty careful in the way you place a lens in order to get genuinely true——

Mr. Kiendl: I submit, if your Honor please, if the witness has had no experience he can't testify.

Mr. Hunt: All right.

Q. In this picture you can judge pretty well the angle at which it was taken, can't you, or can you?

A. Yes, sir.

Q. Now, you can see the path here, can you not?

A. Yes, sir.

Q. And you can see the place, just as you told Mr. Kiendl, where it comes up to the ties and other places it does not, and that can be seen right in the photograph?

A. Yes, sir.

Q. And walking along that path you testified it was approximately, on an average, now, about how wide? Can you show with your hands?

A. I should judge about that wide (indicating).

Q. That is somewhere possibly about two feet or possibly a little more?

Mr. Hunt: It is conceded that the only trains that went through there, Mr. Kiendl, were freight trains? That is, there are no passenger trains on this road?

Mr. Kiendl: I don't know. I am perfectly willing to concede it for the purpose of the record.

Mr. Hunt: I am so advised.

Mr. Kiendl: Subject to correction we will make that stipulation.

[fol. 161] Q. You have seen the trains, you told these gentlemen, as a regular course, people using the path when some freight train would be moving in either direction?

A. Yes, sir.

Q. Now, if you were walking opposite a train and you kept to the outside of the path—naturally you would keep to the outside of it, wouldn't you?

A. Yes, sir.

Q. If you kept to the outside of the path and your freight train was here coming to you, there would be how much space, approximately?

A. About a foot or two feet.

Q. And have you ever had much experience here in New York City?

A. No, sir.

Q. You have never stood on our subway platforms when the trains come in and go by you?

A. Yes, sir.

Q. You have?

A. Yes, sir.

Q. And you have stood there, I suppose, during the rush hours?

A. Yes, sir.

Q. Haven't you?

A. Yes, sir.

Q. So you know about the average space that is left between a person when a train is going by?

A. Yes, sir.

Mr. Hunt: Now I will taken this group of pictures and I will offer them in evidence. There is no objection, or they have been offered by Mr. Kiendl.

(Defendant's Exhibits A, B and C received and marked in evidence.)

Mr. Hunt: D is a group I have not looked at, taken before the accident, in 1933.

Mr. Kiendl: That is right.

[fol. 162] Mr. Hunt: I have no objection to these pictures. Don't we agree, Mr. Kiendl, that they were taken for a different purpose, to show the section that was on the opposite side of Rock Street? I mean it just——

Mr. Kiendl: No, we don't agree on that at all.

Mr. Hunt: All right, sir.

Mr. Kiendl: We agree that the pictures were taken to show the territory that was included in both sides.

Mr. Hunt: All right, sir; they speak for themselves.

Mr. Kiendl: I think so.

(Defendant's Exhibit D for identification received and marked in evidence.)

Q. Mr. McHale, I will call your attention first to a group of pictures taken in 1933, and ask you to go over them with

me. Do you see Rock Street running through here at the upper part of the picture?

A. Yes, sir.

Q. And do you see Rock Street again here (indicating)?

A. Yes, sir.

Q. In fact, in every one of these pictures the territory, that land that we are talking about lies in the distance?

A. Yes, sir.

Q. Am I correct?

A. Yes, sir.

Q. The close-up part of the picture, one of them is on what would be the south side of Rock Street?

A. Yes, sir.

Mr. Hunt: With that explanation, gentlemen, you may see them (handing pictures to jury).

[fol. 163] I don't know what your Honor's procedure is; whether I should go ahead.

The Court: Well, you might let the jury look at the pictures before you go ahead. They can't center their thoughts on two things at one time.

Mr. Hunt: Right.

(Interlude while jury examines pictures.)

Q. Mr. McHale, I want to take this group of pictures taken in April, 1935, which is Exhibit C, and I will call your attention to the first photograph, and that shows, does it not, the space between the car tracks and the upright stanchion upon which the crossing sign is?

A. Yes, sir.

Q. Now, at that place, as appears by the picture, the automobiles and trucks and pedestrians all had to use that same place?

A. Yes.

Mr. Kiendl: I object to that. The picture shows no such thing.

Mr. Hunt: Well now, we may differ, but I will ask the witness.

Mr. Kiendl: That is all right.

Q. In the space between the stanchion and the tracks you see the ruts?

A. Yes, sir.

Q. And places where the cars have gone?

A. Yes, sir.

Q. And is that place also used by pedestrians?

A. Yes, sir.

Q. Now, as you follow along do you see the tracks of the automobiles?

A. Yes, sir.

Q. And do they gradually, not abruptly, but do they gradually pull away from the track?

A. Yes, sir.

[fol. 164] Q. And the path itself continues where?

A. To Hughes Street.

Q. And you can see where the tracks on these photographs produced by the defendant gradually pull away from the tracks?

A. Yes, sir.

Q. Now, the path itself, does that pull away from the tracks or does that continue approximately along the side of the tracks?

A. Why, that pulls away in different places. As you see here, here is a piece of ground between the path and the railroad tie.

Q. Now then, of course, down here on the lefthand side of the picture, what is this condition, do you know, where these dark shadows are?

A. Well, that is sort of a ditch or a hole there.

Q. I will show you another photograph where it possibly shows better. Now then, we have got, looking at the second picture, you have your pole, you see that?

A. Yes, sir.

Q. And you see the roadway leading in?

A. Yes, sir.

Q. And you see a part of this ditch which was questioned yesterday, do you not?

A. Yes, sir.

Q. And then you see more of the condition which I just asked you about in here, dark shadows?

A. Yes, sir.

Q. Let me ask you at this time, when Bill, as you call him,—what is it, Colwell?

A. Colwell.

Q. When Colwell would come out of the gate, he would, you have told us, go approximately straight up to the main path before he made a turn?

A. Yes, sir.

Mr. Hunt: Certainly, yes.

Mr. Kiendl: I told you the pictures were taken, Plaintiff's Exhibits 2 and 3, on the 18th day of April, 1935. Do you accept that or not?

Mr. Hunt: Oh, no; I accept it.

[fol. 151] Q. Now I show you a set of six pictures and ask you to look at them and tell us, if you can, whether they represent the conditions that existed down near that Rock Street crossing at the time of the occurrence of this accident. Of course the pictures were taken in daylight; the accident happened in the middle of the night.

A. I would say the ground is much rougher on this picture than it shows.

Q. I see.

Mr. Hunt: Will you read the answer, please?

(Answer read by the stenographer.)

Q. You mean on these pictures?

A. Yes, sir.

Q. What you mean to tell the jury is that the pictures do not show the conditions as they existed on the day of the accident, but that the fact was that the territory was rougher when the accident happened than the pictures show?

A. Yes, sir.

Mr. Kiendl: Now I ask to have these pictures, which are fastened together, six, marked as one exhibit for identification.

(Marked Defendant's Exhibit C for identification.)

Q. Now, Mr. McHale, I show you another batch of pictures, six of them, and ask you to look at that batch and tell us whether that batch shows the conditions as they existed at that place the day of the accident?

A. It is much rougher than it shows on these pictures too.

[fol. 152] Mr. Kiendl: Now I ask to have that batch of pictures marked Defendant's Exhibit D for identification fastened together as one exhibit.

(Marked Defendant's Exhibit D for identification.)

Mr. Kiendl: By stipulation, if your Honor please, it will be stipulated that the pictures comprising the Defend-

ant's Exhibit D for identification were taken on April 5, 1933.

Mr. Hunt: 1933?

Mr. Kiendl: 1933.

Mr. Hunt: Before the accident?

Mr. Kiendl: Before the accident.

Mr. Hunt: And this?

Mr. Kiendl: Was taken on April 18, 1935, after the accident.

Q. Now, you were there, living there, on April 5, 1933, weren't you?

A. Yes, sir.

Q. You were living there on April 18, 1935, weren't you?

A. Yes, sir.

Q. Now I am going to show you Defendant's Exhibit C for identification again, pictures stipulated to have been taken on April 18, 1935, and I show you the second picture in that exhibit. That shows the standard on which the crossing sign is erected, doesn't it?

A. Yes, sir.

Q. It shows in the center of the bottom part of the picture the end of the drain pipe that goes under the railroad tracks at Rock Street; is that right?

A. Yes, sir.

Q. The other picture shows what you call the drain?

A. The ditch.

[fol. 153] Q. The ditch?

A. Yes, sir.

Q. Now, you said that ditch was very deep?

A. Yes, sir.

Q. How deep is it?

A. I would say approximately about two feet.

Q. Two feet?

A. Yes, sir.

Q. Deep?

A. Yes, sir.

Q. The fourth picture shows that ditch from the railroad sign right down to the end of the fence, doesn't it?

A. Yes, sir.

Q. Does it show it correctly?

A. No, sir.

Q. You mean to say that that picture of that very ditch does not show the condition as it existed there in April of 1935?

A. No; it is deeper.

Q. How about the next one, the fifth picture?

A. No, sir; it doesn't show it; it is deeper than that.

Q. It looks right at the ditch, doesn't it?

A. Yes, sir.

Q. You say it is deeper than shown in that picture?

A. Yes, sir.

Q. Now, did you tell us, Mr. McHale, that it would be dangerous for a man to walk across the ditch at the point where the fence is?

Mr. Hunt: I object to that as incompetent, irrelevant and immaterial.

The Court: Overruled.

Mr. Hunt: Exception.

A. Yes, sir.

Q. How old a man are you?

A. Twenty-four years of age.

Q. And you mean to say it would be dangerous for you, in April of 1935, in July of 1934, and in April of 1933, to walk across that ditch?

A. Yes, sir.

[fol. 154] Q. Why dangerous?

A. Why, you might slip down off the edge of that and fall in it and break your leg or something.

Q. The ditch is lined with paving stones, isn't it?

A. Yes, sir.

Q. And you have never seen anybody at any time walk over that ditch?

A. No, sir.

The Court: With the exception of Colwell. Did you ever see Colwell walk over that ditch?

The Witness: No, sir.

The Court: Did you ever see the man that you called Bill—that is Colwell?

The Witness: That is Colwell.

The Court: You never saw him walk across it?

The Witness: No, sir; not across the ditch.

The Court: Did you ever see anyone walk across that ditch?

The Witness: No, sir.

Q. You never saw anybody take a short-cut from the crossing sign to that gate that leads into the back porch of Mr. Colwell's house, did you?

A. No, sir.

Q. Have you looked at people walking along there very often in the daytime?

A. Yes, sir.

Q. Have you looked at night?

A. Yes, sir.

Q. And you have seen all kinds of people walking along this path?

A. Yes, sir.

Q. School children?

A. Yes, sir.

Q. You have seen school children walking along there?

A. Yes, sir.

[fol. 155] Q. And did you ever see them walking along there at night?

A. Children coming home from school; yes, sir.

Q. At night?

A. Yes, sir.

Q. After six o'clock?

A. Yes, sir.

Q. After eight o'clock?

A. Yes, sir.

Q. School is open, too?

A. No, but the children are walking along there when they are out playing.

Q. After ten o'clock at night?

A. Well, how old of a child?

Q. Any age of child; have you seen children walking there after ten o'clock at night?

A. Yes, sir.

Q. On that path?

A. Yes, sir.

Q. Have you seen them walking there after twelve o'clock at night?

A. Yes, sir.

Q. Children?

A. Not children.

Q. That is what we are talking about, only children now. You have not seen any children walking there after twelve o'clock at night, have you?

A. No, I cannot say I did.

Q. Now, have you seen any people going to church using that path?

A. Yes, sir.

Q. Have you ever seen them use it after twelve o'clock at night?

A. Yes, sir.

Q. Going to church?

A. No, not going to church.

Q. Well, we are talking about people going to church now; you haven't seen any people going to church after twelve o'clock at night walking along that path?

A. No, sir.

Q. And in 1934 most of the mines down around there were closed and working on part time, weren't they?

A. Yes, sir.

Q. Did you ever see any mine workers going along that path after twelve o'clock at night to and from work?

A. Yes, sir.

Q. And other people?

A. Yes, sir.

[fol. 156] Q. The people who used the path are the people who lived in Hughes Street?

A. No, not necessarily; people——

Q. Principally?

A. Principally, yes.

Q. If you continued walking on that path past Hughes Street, there was no place to go except on down to Lackawaxen, was there?

A. You mean going down this way?

Q. Yes, going from Rock Street to Hughes Street, if you kept on walking along the railroad track you get out in open country, don't you?

A. No, you get into a little hill called Court Lane.

Q. How far from Hughestown?

A. I should judge about a mile or a mile and a half down the track.

Q. And have you seen people walking down this path going in that direction past Hughes Street and down?

A. Yes, sir.

Q. Seen them walking at night time?

A. Yes, sir.

Q. Now, Mr. McHale, have you ever seen anybody walking along that path when a train was passing?

A. Yes, sir; I have done it myself.

Q. You have?
A. Yes, sir.
Q. Outside of yourself have you seen any other people walking along that path when trains were passing?
A. Yes, sir; and I have seen them wheel wheelbarrows with coal in them when the train was going.
Q. You mean they used the path with wheelbarrows with coal?
A. Yes, sir.
Q. And where were they taking that coal from and where were they taking it to?
A. They were taking it from what we call a strippings, which is up towards Avoca.
[fol. 157] Q. And had you ever seen them doing it at night?
A. Yes, sir.
Q. Wheeling coal at night along that path?
A. Yes, sir; up to eight or nine o'clock, yes.
Q. Well, after eight or nine o'clock have you seen them?
A. No; I would not say after eight or nine o'clock.
Q. Have you ever seen anybody walking along that path at night in the pitch dark when a train was going by?
A. Yes, sir.
Q. How many times have you seen people doing that, Mr. McHale?
A. I have seen them hundreds of times.
Q. Hundreds of times at night?
A. Yes, sir.
Q. In the pitch dark?
A. Yes, sir.
Q. Walking along that path?
A. Yes, sir.
Q. And you have walked along it yourself at night?
A. Yes, sir.
Q. And when you were walking along it, when you got to the point that we are interested in——
A. Yes, sir.
Q. (Continuing.)—where these two paths converge——
A. Yes, sir.
Q. —alongside of the ties; you have done that often, haven't you?
A. I have walked it; yes, sir.
Q. How close was your body to the moving side of the train when you did that?

A. Oh, I would say a foot or two feet away.
Q. A foot or two feet away?
A. Yes, sir.
Q. And you tell this Court and Jury that you have walked alongside of a moving train?
A. Yes, sir.
Q. At night?
A. Yes, sir.
Q. With the side of that moving train within a foot of your body?
A. Yes, sir.
[fol. 158] Q. And you have seen other people do that?
A. Yes, sir.
Q. And the trains go by there pretty fast, wouldn't they?
A. Yes, sir.
Q. Sometimes twenty miles an hour, thirty miles an hour, forty miles an hour?
A. Yes, sir.
Q. And you have done that frequently?
A. Yes, sir.
Q. Did you think that was dangerous?
A. No, sir.

By the Court:

Q. Would you do that with the train going opposite to you?
A. Yes, sir.
Q. And towards you?
A. Yes, sir.
Q. You would do it either way?
A. Yes, sir.
Q. That is the train going——
A. Either way it goes.
Q. A train coming toward you or opposite you?
A. Yes, sir.

By Mr. Kiendl:

Q. You mean, Mr. McHale, that you would be walking at night along that footpath close to the edge of the ties?
A. Oh, I would be away from the ties if I was on the path; if I was on the outer course of the path you would be away from it.

Q. We are trying to fix it on the inner course of the path where the paths approach right up to the ties, as we have agreed; do you know where I mean?

A. Yes, sir.

Q. When you were walking along there at night?

A. Yes, sir.

Q. Within a foot of a moving train?

A. Yes, sir.

[fol. 159] Q. Even if the train came toward you?

A. Yes, sir.

Q. Or whether it came behind you, you would walk through that territory?

A. Yes, sir.

Q. And not consider it dangerous?

A. No, sir.

Mr. Kiendl: That is all.

Mr. Hunt: Just a question or two.

Mr. Kiendl: He did not identify these two pictures.

Q. Defendant's Exhibits A and B have been marked for identification. Do they show the conditions as they existed there in April of 1933?

A. No, sir; it is much rougher than that.

Q. It is much rougher than these pictures show?

A. Yes, sir.

Mr. Kiendl: I will offer Defendant's Exhibits C and D in evidence, if your Honor please.

Mr. Hunt: I want to look at them for just a moment.

Redirect examination.

By Mr. Hunt:

Q. Now, Mr. McHale, you were asked by Mr. Kiendl about whether in some discussion you had with a railroad man anything was said between you about any paths. Let me ask you, did he ask you about any paths?

A. No, sir.

Q. Did he ask you how many years people had been using the paths that were there?

A. No, sir.

Q. He did not ask you anything like that?

A. No, sir.

Q. It didn't occur to you to say anything one way or the other about that?

By Mr. Kiendl:

Q. Do you tell this Court and jury that you feel perfectly safe walking at night on this path with a train moving up to forty miles an hour?

A. Yes, sir.

Q. Passing you within one foot of the side of your body?

A. Yes, sir.

Mr. Kiendl: That is all.

(Witness excused.)

WILBERT SCHULTZ, called as a witness on behalf of the plaintiff, being duly sworn, testified as follows:

Direct examination.

By Mr. Hunt:

Q. Mr. Schultz, you are a resident of Hughestown, are you not?

A. Yes, sir.

Q. And you have been a resident there how many years?

A. Thirty-nine.

Q. What is your business, may I ask?

A. Moulder.

Q. And you, as a matter of fact, knew Harry Tompkins when he worked his fourteen years at the same place you do?

A. Yes, sir.

[fol. 175] Q. What is the name of that concern?

A. Pittston Stove Company.

Q. And aside from knowing him as a fellow workman, had you ever visited at his home or had he visited at your home?

A. No, sir.

Q. Now, on the night of his accident had you and the witness Harrington been some place?

A. Yes, sir.

Q. By the way, your plant where you worked had been closed down; what is your recollection; approximately how long; how many weeks before this accident?

A. About four weeks.

Q. And you and Harrington had been where on the night of this accident?

A. Harvey's Lake.

Q. That is some distance away from Hughestown?

A. Yes, sir.

Q. What is it, a matter of twenty miles or farther?

A. Oh, about twenty or twenty-five miles.

Q. And you were returning home some time after midnight. Can you fix the time now; do you recall the time; how close to two o'clock?

A. Well, about half-past one.

Q. At any rate, on your way down, when you got to any particular place, did you see someone on the road walking?

A. Yes, sir.

Q. And did that person turn out to be Harry Tompkins?

A. Yes, sir.

Q. That was about how far outside of—I will put it this way: That was on a bridge, was it not?

A. Yes, sir.

Q. That bridge was about how far from this crossing that we were speaking about?

A. Oh, it is a mile and a half or two miles.

Q. And — you passed by did you recognize the man who was walking?

A. Yes, sir.

Q. You are not permitted to tell us what you said, but [fol. 176] did you say something—were you driving, or Mr. Harrington?

A. No, sir.

Q. Who was driving?

A. Mr. Harrington.

Q. Did you say something to Mr. Harrington after you recognized Harry on the road?

A. Yes, sir.

Q. After you said something to him, did he stop?

A. Yes, sir.

Q. And did Mr. Tompkins get in the car and go on down to Hughestown?

A. Yes, sir.

Q. And you let him out where?

A. At Rock Street.

Q. Now, sir, when you got to Rock Street and he got out,

I assume you said good-night, and that is all you knew until the following day?

A. Yes, sir; the following day.

Q. Now, during the thirty-nine years that you have lived in Hughestown, what part of the village, if you call it that, or the borough, did you live in?

A. On the upper end of Rock Street.

Q. And is that up around Searle Street?

A. It is up beyond Searle Street, up over the railroad.

Q. Well, during those thirty-nine years, let me see—how old are you?

A. Thirty-nine.

Q. You were born right there in this borough?

A. Yes, sir.

Q. You went to school there?

A. Yes, sir.

Q. You went to church there?

A. Yes, sir.

Q. Raised your family there?

A. Yes, sir.

Q. And so I take it you are familiar with that section between Rock Street and the dead end of Hughes Street?

A. Yes, sir.

Q. Have you ever used it yourself?

A. Several times; yes, sir.

Q. Have you seen other people use it?

A. Yes, sir.

[fol. 177] Q. And you know the roadway that goes between the tracks and that stanchion that holds the sign, do you?

A. Yes, sir.

Q. And you know the two paths, do you, that you heard described here in court?

A. Yes, sir.

Q. You have seen those used by whom?

A. By pedestrians.

Q. They were used how many years? How long has that territory been used?

A. Twenty years, anyhow.

Q. Now, just to anticipate one question, there is some question raised here about whether people ever used—I will show you some pictures. Do you see where I am re-

ferring to Defendant's Exhibit C, the first picture, do you see where the roadway comes in—do you not?

A. Yes, sir.

Q. I call your attention to the left of the picture, these black shadows; you can see the grade there which goes down, can you not?

A. Yes, sir.

Q. That grade, is that a uniform grade or is it steeper at some places than others?

A. Steeper, and holes in it.

Q. Now, you can see a man down here?

A. Yes, sir.

Q. No place is it exactly alike, according to the photograph, is it?

A. No, sir.

Q. Now, the question that has been raised here is whether people, your average citizens up there, do they use this path up along the tracks or do they go through down where these grades are and where this ditch is and so on?

A. They use the path.

Q. Did you ever see anybody down in here (indicating)?

A. No, sir.

[fol. 178] Cross-examination.

By Mr. Kiendl:

Q. Mr. Schultz, you only know of two paths there?

A. Yes, and the one leading out of Mr. Colwell's gate.

Q. You did not mention that until I drew that to your attention?

A. No, sir.

Q. Have you seen people walking up the path from Mr. Colwell's gate?

A. No, sir.

Q. Have never seen anybody walking up that path?

A. No, sir.

Q. At any time?

A. No, sir.

Q. Well, when did you last see that path from Mr. Colwell's gate up to the railroad track?

A. I can't recall.

Q. You have never seen it, have you?

Q. He did not try to go through here (indicating)?

A. No, sir.

Q. Now, looking at the other photograph, you can see a part of this—what is that, a thirty inch drain?

A. Yes, sir; about thirty.

[fol. 165] Q. See one end of the drain, and you are looking across west of the ditch, are you not?

A. Yes, sir.

Q. You are not looking down in it?

A. No, sir.

Q. And you see something was said—Mr. Kiendl said something about—what did he say that was lined with before?

A. Stone.

Q. Well, these stones, is that a nice, solid footing, or are those loose stones lying around there?

A. Those are all loose stones there.

Q. Are those stones solid or what?

A. Some is solid and some isn't.

Q. They can be seen from the picture, can't they?

A. Yes, sir.

Q. Now, looking at the fourth photograph we see the stones better, don't we?

A. Yes, sir.

Q. Scattered all around there?

A. Yes, sir.

Q. And are you looking across the ditch there with your camera or lens looking down in it?

A. Looking across.

Q. Looking across again?

A. Yes, sir.

Q. And here you begin to see the embankment more abruptly?

A. Yes, sir.

Q. Here we have still another angle, the stones were fairly well intact according to the picture which they have put in, up until they go to the end of that picket fence; isn't that about the size of it?

A. Yes, sir.

Q. That shows right in the picture?

A. Yes, sir.

Q. Is that picture taken diagonally across the ditch or is that taken looking down into it?

A. Across.

Q. Now, in order to get at the depth of your ditch, you get it best from this last photograph, don't you?

A. Yes, sir.

Q. Because you are looking right into the side or bank?

A. Yes, sir.

[fol. 166] Q. And then you see the loose stones around there?

A. Yes, sir.

Q. That is the last photograph?

A. Yes, sir.

Mr. Hunt: That is all, and I ask that the gentlemen be allowed to study this rather carefully and have them all.

Mr. Kiendl: I join in that request. I would like them to study them carefully. May they also have and study the other two, A and B?

The Court: Yes, they may have all the photographs.

Q. These pictures, A and B, again show the place that we are interested in, show it in the distance, do they not?

A. Yes, sir.

Q. In other words, the close-up part of the two pictures——

A. Yes, sir.

Q. (Continuing.) —is to the south side of Rock Street?

A. Yes.

(Photographs handed to the jury.)

Recross-examination.

By Mr. Kiendl:

Q. Mr. McHale, it has been stipulated in this case that the distance from the railroad track where the rail is down to the fence alongside the property where you live and where Mr. Colwell lives is about thirty-five feet.

A. Yes, sir.

Q. Now I am going to ask you to assume that this room is thirty-five feet wide—that is about right, isn't it, this room from wall to wall is somewhere in the neighborhood of thirty-five feet or forty feet wide?

A. Yes, sir.

[fol. 167] Mr. Hunt: Haven't we got the actual measurements of this room?

Mr. Kiendl: Yes, I would like to have the actual measurements if we have them.

The Court: Well, I think we can measure it. We have some sort of a ruler here that we can measure it right away.

Mr. Hunt: I think the Clerk may possibly have the measurements.

The Court: Have you, Mr. O'Grady?

The Clerk: No, sir, I haven't, Judge Mandelbaum.

Mr. Kiendl: I can measure it off pretty accurately if Mr. Hunt will accept it, thirty-five feet from this wall.

Mr. Hunt: All right, go ahead.

Mr. Kiendl (pacing room): I make it just about thirty-five feet.

Mr. Hunt: All right,

Mr. Kiendl: You accept that as substantially correct?

Mr. Hunt: Yes, that is near enough.

Q. Now, this territory, thirty-five feet from the rail to the fence, you say it slopes downward to the fence about four feet?

A. Yes, sir.

Q. So that if the fence were here, the rail——

Mr. Hunt (interrupting): Wait a minute, Mr. Kiendl. Something is wrong. Your distance from that picket fence, something is wrong here (indicating blueprint). Up to the first rail of the car track, including ties and all, is less than an inch and a half, and did you tell me this is——

Mr. Kiendl: About thirty-five feet,

[fol. 168] Mr. Hunt: Wait a minute. Did you tell me this scale is twenty feet to an inch?

Mr. Kiendl: That is right.

Mr. Hunt: Well then, that distance is less than thirty feet on your own blueprint.

Mr. Kiendl: Well, do you want it thirty feet?

Mr. Hunt: Well, it is even less than that, but that will be nearer to it.

Mr. Kiendl: Well, do we agree, then, that the distance is about thirty feet?

Mr. Hunt: I will give it to you accurately.

Mr. Kiendl: We stipulated it was thirty-five. I will stipulate it any way you want it.

Mr. Hunt: Your distance is twenty-nine feet, Mr. Kiendl.

Mr. Kiendl: Twenty-nine feet?

Mr. Hunt: Twenty-nine feet.

Q. Well, twenty-five feet, Mr. McHale, would be up to the end of this rail from here to the wall. Now, you say in that

distance from the fence to the top of the rail there was an average slope of about four feet?

A. Yes, sir.

Q. And you know what four feet are, don't you?

A. Positively.

Q. You know I am about six feet high?

A. Yes, sir.

Q. Then the fact is, Mr. McHale, isn't it, that the rail would be about this much higher, indicating the rear post on this jury box, than the floor, twenty-nine feet away, if that is the exact measurement?

A. Yes, sir.

Q. Was there any reason that you know of why, in that [fol. 169] territory, a man could not walk with perfect safety, if he wanted to, outside of these ditches? Is there or isn't there?

A. Well, there isn't, but——

Q. Except what you have said there isn't?

Mr. Hunt: Your Honor, I submit the witness ought not to be shut off in his answer.

Mr. Kiendl: I asked him if that is what he said.

Mr. Hunt: Well, he had not finished, obviously.

The Witness: I said there isn't any danger of walking down there, but on account of the ditches people can't walk down in there.

Q. There isn't any danger of walking down in there; do we agree on that?

A. Well, you might slip or fall on the grade, on the cinders.

Q. You might slip or fall on this grade of four feet over a distance of twenty-nine feet?

A. Yes, sir.

Q. Were there any ditches in there such as you have shown in this photograph between the crossing sign and the edge of the fence and along the edge of the fence?

A. Yes, there is ditches there.

Q. They don't show in any of these pictures, those ditches, do they?

A. No, sir.

Q. But they are there?

A. They are there.

Q. Now, you told Mr. Hunt on your redirect examination that naturally when you were walking along that patch and a train came you would move to the outside of the path?

A. Yes, sir.

Q. Will you tell us why?

A. I would keep to the outside because there would be safe walking there.

Q. And was there anything about that ground in there as you were walking along that path that would prevent you [fol. 170] from walking off the path a foot for five, six, eight, ten, twenty feet, if you wanted to? Was there?

A. No, sir.

Q. Now, when you walked along there and you got on the outside of the path when the trains were coming to you or from behind you, you told Mr. Hunt that the moving trains would be within a foot or two of you?

A. Yes, sir.

Q. Even if you were walking on the outside of the path?

A. Yes, sir.

Q. That is what you told him?

A. Yes, sir.

Q. And that is true, isn't it?

A. Yes, sir.

Q. Now, looking at the pictures, Plaintiff's Exhibits 2 and 3, I didn't ask you, Mr. McHale, but I will ask you now whether they show the conditions as they existed there? These are photographs that the plaintiff has offered in evidence?

A. No, sir.

Q. They do not?

A. No, sir.

Q. Well, what is wrong with these pictures? Are they too rough or——

A. They are not rough enough.

Q. They are not?

A. Down in here there is more ditches (indicating).

Q. Down along here; you point to a building?

A. I am pointing right along in here (indicating).

Q. That place you point to in Plaintiff's Exhibit 2 is the place that you see, isn't it, in Plaintiff's Exhibit 3 where the path is, isn't it?

A. No; right in here, along in through here is all ditches (indicating).

Q. But that territory is all shown in Plaintiff's Exhibit 3, but the ditches do not show; is that right?

A. That is right.

Q. Are those ditches two feet deep through there?

A. I would not say they are two feet.
Q. Are they two inches deep?
A. Yes, better than that.

[fol. 171] Q. Better than that, but they don't show in these pictures?
A. No, sir.
Q. Now, Mr. McHale, how wide are these ties on the railroad tracks here, about eight feet wide?
A. Yes, sir.
Q. You see them?
A. Yes, sir.
Q. They show correctly the ties under the rails of the railroad track coming up to Hughes Street, don't they?
A. Yes, sir.
Q. And they are about eight feet wide?
A. Yes, sir.
Q. The path at certain points comes right up to the edge of the ties, doesn't it?
A. Yes, sir.
Q. When you walk along there and trains went by, was there any overlapping from the engines or any of the cars onto these ties?
A. Just about the end of the tie.
Q. Just about the width of the tie?
A. Yes, sir.
Q. Didn't you notice, Mr. McHale, that the engines have an overhang of almost one foot on each side beyond the ends of the ties?
A. No, sir.
Q. Haven't you noticed that some of the freight cars in these trains were as wide as ten feet, ten feet six inches?
A. Just the overhang of them is just about to the end of the ties.
Q. And you have never seen any of that overhang coming over the ends of these eight feet ties?
A. Very little overhang.
Q. But you have seen some, haven't you?
A. Yes, sir.
Q. You have seen it as much as a foot beyond the edges of the ties, haven't you?
A. No, I would not say a foot.
Q. Have you seen any engines that were over ten feet wide?

A. I just could not say how wide they were.

[fol. 172] Q. Have you seen any engines with cylinders on the sides that projected over the edges of these ties coming down there?

A. No, sir.

Q. You don't know how wide the freight cars are, do you?

A. No, sir; I never measured them.

Q. Box cars, gondola cars, furniture cars, automobile cars, merchandise cars, you have never measured them?

A. No, sir.

Q. You know they are not all alike in width, don't you?

A. Very little difference in them.

Q. Very little difference?

A. Yes, sir.

Q. Is that your testimony, that there is very little difference in them?

A. In the width of them, yes, sir.

Q. Don't they vary from nine feet up to eleven feet in width, or don't you know?

A. I just could not say how much they vary.

Q. You have had some experience on subway stations in New York in watching trains coming in, haven't you?

A. Yes, sir.

Q. And you know that subway trains are all standard width, don't you, all exactly alike? You know that, don't you?

A. I don't know whether they were alike or what they were; I just know them to see them.

Q. And when they come into subway stations in New York and you are standing there, do you stand within a foot of them?

A. Yes.

Q. Anybody warn you to stand back?

A. No, sir.

Q. Never ordered to stand back when trains came in?

A. I always stand about right on the edge of the platform.

Q. You don't mean that, do you?

A. Yes, sir.

Q. You stand on the flat edge of the station platform when subway cars are coming in?

[fol. 173] A. About that distance from the edge, I stand right there (indicating).

Mr. Kiendl: That is all.

Redirect examination.

By Mr. Hunt:

Q. Mr. McHale, have you from your observation, living along the tracks, have you noticed, or have you not, that the widest part of any train is the engine itself?

A. Yes, sir.

Q. So that if an engine—if you are in a place of safety when the engine goes by you, why, that is——

A. That is sufficient.

Q. That is sufficient?

A. Yes, sir.

Q. Unless there is some door?

A. Unless there is an object; that is different.

Recross-examination.

By Mr. Kiendl:

Q. Do you mean that, Mr. McHale, that the engines are always the widest part of the trains?

A. Yes, sir.

Q. You haven't seen any trains with different sized engines and different sized cars?

A. I have seen different size engines, yes, sir.

Q. So do you, when you walk along this track, proceed on the theory that if the cylinder of the engine clears you you are all right for the rest of the train?

A. Yes, sir.

Q. That is your idea?

A. Yes, sir.

Redirect examination.

By Mr. Hunt:

Q. Especially if there is a foot or two between you and the side of the train?

A. Yes, sir.

[fol. 174] The Court: I think we have gone into that enough.

Mr. Hunt: That is all.

Mr. Kiendl: May I ask one final question, your Honor, and I will only make it one.

Q. And when you went there in the daytime you would use the paths?

A. If I would happen to come down the open field, I would use it.

Q. Well, you did use the path for yourself for possibly about twenty times in your life?

A. Yes.

Redirect examination.

By Mr. Hunt:

Q. What Mr. Kiendl wants to develop is that you used the path in the daytime and some other way at night?

A. Yes.

Q. Is that the fact? I mean what is the reason for that? I think I understand, but explain it to us.

[fol. 187] A. Why, I lived up, at different times, at one time up over this hill through the fields, see?

Q. Yes.

A. And if I was coming down in the daytime I would go down through the field where these paths come in, the diagonal paths.

The Court: I think he has testified to that over and over again.

Mr. Hunt: Yes. I will be short.

Q. You used to live down here over the hill?

A. At one time.

Q. Then you would take the diagonal path, either day or night, down to where your friend lived?

A. Yes, sir.

Q. Now you live away up here above Searle Street, do you not?

A. Yes, sir.

Q. And if you were going down, how did you go?

A. Down Rock Street.

Q. And then how?

A. Well, I would come over and go over to Hughes Street.

Q. Come over and go over to Hughes Street?

A. Yes.

Recross-examination.

By Mr. Kiendl:

Q. Regardless of the reason, the fact is that you never did use the path at night and did use it in the daytime?
A. Yes, sir.

The Court: He has testified to that.
Mr. Kiendl: May I ask one more question, and I will promise to desist.

Q. The real reason is that you were afraid to walk along that track at night with trains coming through there?
A. No, sir.

[fol. 188] By Mr. Hunt:

Q. No truth in that reason. Is there anything in that reason at all?
A. No, sir.

Mr. Hunt: That is all.

(Witness excused.)
(Informal recess.)

Ernest Cook, called as a witness on behalf of the plaintiff, being duly sworn, testified as follows:

Direct examination.

By Mr. Hunt:

Q. How old a man are you, Mr. Cook?
A. Thirty-four.
Q. You are a resident of the Borough of Hughestown?
A. Yes, sir.
Q. Live there with your family?
A. Yes, sir.
Q. And your business is what?
A. Commissioner of Streets.
Q. Now, a commissioner of streets up there in a community of that kind also does some work, does he not?
A. Positively.
Q. Actual work?

A. Yes, sir.

Q. Your work is what?

A. Well, I take care of the streets, repairing the streets, sewers, fire alarm system and also drive the fire truck.

Q. Drive what?

A. Drive a fire truck.

Q. Outside of that you haven't anything to do until tomorrow? You also drive a borough truck, do you not?

A. Yes, sir; the borough truck.

[fol. 189] Q. Well, that is used for what?

A. Borough purposes; borough work.

Q. And what about the collection of garbage?

A. Take that twice a month.

Q. Do you do that yourself?

A. Yes, sir; with the help of two men.

Q. You have lived at Hughestown how many years?

A. Fourteen years.

Q. You are familiar with this section of the village we have been talking about during the trial?

A. Yes, sir.

Q. You know the condition of the land there between Hughes Street and Rock Street, do you not?

A. Yes, sir.

Q. Have you used it yourself?

A. Many times.

Q. And both as a pedestrian and in your work with the trucks?

A. Yes, sir.

Q. As a matter of fact, how do you get in onto Hughes Street when you are collecting the garbage?

A. Down Rock, across the railroad, pull to the right, come into the right between the sign and the railroad and come back over into Hughes Street.

Q. So that we will understand that when you—your headquarters, so to speak, if you call it that, your headquarters are east or west of the railroad?

A. East.

Q. That is down in what we refer to where the baseball field and school and church and those things are?

A. Yes, sir; right next to the school.

Q. When you start collecting garbage you say you come down Rock Street; you mean you go west?

A. Yes, sir.

Q. And when you get to the tracks, to go in onto Hughes Street, you do what?

A. Turn to the right between the track and the sign.

[fol. 190] Q. You have been doing that how many years?

A. Five years.

Q. You have heard described, and I am trying to shorten this up, the paths that the pedestrians use, both the one between Rock Street and Hughes and the one that runs up to the end of—diagonally to the end of Hughes Street down through to the colliery?

A. Yes.

Q. Now, let me ask you, directing your attention to those two paths, do they come to some point?

A. At Hughes Street.

Q. And the place where they meet, how wide is that point of them where they meet?

A. Oh, I should judge about four feet and a half.

Q. And the path that continues towards Rock, from Hughes over to Rock, is that the same width or does it narrow down somewhat?

A. It narrows down somewhat on the way over.

Q. And the path that continues diagonally across the track, does that likewise narrow somewhat?

A. Yes, sir.

Q. Some suggestion has been made that people should go across the ditch. You know that ditch that is there, do you not?

A. Yes, sir.

Q. By the way, how deep is that ditch?

A. About two feet.

Q. And it varies somewhat, I suppose, like all—it is a cobblestone ditch?

A. Well, yes, cobblestones, but the cobbles are loose.

Q. Are those cobblestones lying there between that picket fence?

A. Yes, loosened up and a lot of them is out of there, the weather has pulled them out.

Q. A lot of them out, and I just asked you the kind of footing there from where the railroad continues and you [fol. 191] say you have pretty good solid cobblestones until you get to the end, to the telegraph pole which is the end of the block, is it?

A. Yes, sir.

A. Yes, sir; I see it.
Q. You saw a path there?
A. Yes, sir.
Q. Years ago?
A. Yes, years ago.
Q. And you remember now that there was a path there?
A. Yes, sir.
Q. But you never saw anybody use it?
A. No, sir.
Q. And you have been on the path alongside the railroad tracks several times?
A. Yes, sir.
Q. What do you mean by several times; three or four or a dozen or a hundred or what?
A. Not a hundred times or not three or four.
Q. Well, what is your best estimate about how many do you mean by several times?
A. Oh, maybe ten or twenty.
Q. Maybe ten or twenty?
A. Yes, sir.
Q. In the daytime?
A. Daytime.
Q. And at nighttime?
A. No, sir.
Q. You have never walked along that path at nighttime that you know of?
A. No, sir.
[fol. 179] Q. And you have never seen anybody else walk along it at nighttime, have you?
A. No, sir.
Q. And you have lived there all your life?
A. Yes, sir.
Q. In the daytime, say, other than your twenty times altogether that you used the path, that is the only time that you saw people using the path, when you were using it for some purpose or other, wasn't it?
A. Yes, sir.
Q. So the twenty times you had seen that path used, you had walked along it yourself in the daytime?
A. Yes, sir.
Q. And you had seen other people?
A. Yes, sir.
Q. And does that cover your whole experience in

this territory, what you have told us now, that about twenty times in your life you had used it and seen other people use it when you were——

A. I have used it myself about twenty times.

Q. And that is the time you saw other people using it?

A. They used it other times that I have seen other people using it.

Q. Well, you were just looking to see people using the path, or you just happened to remember you saw them use it?

A. I saw them using it.

Q. You never saw anybody using it at night, did you?

A. No, sir.

Q. In all your thirty-nine years?

A. No.

Q. Going to church and going to school, and bringing up your family?

A. No, sir.

Q. You never saw anybody use that path in the night-time, did you?

A. No, sir.

Q. Now, when you used the path on the twenty times when you used it, if it were twenty times, did you walk along that path along the edge of these railroad ties when trains were coming?

A. Yes.

[fol. 180] Q. You have?

A. Yes.

Q. When trains were coming from either direction?

A. Yes, sir.

Q. And you had been in this stove company business all your life; you had never been in the railroad business, had you?

A. No, sir.

Q. And did the trains come awfully close to you when you were walking along that path?

A. Oh, maybe a foot and a half away.

Q. Maybe a foot and a half?

A. Yes, sir.

Q. And the trains would move at a fairly rapid rate of speed?

A. Fairly good rate of speed.

Q. And they would come from behind you and in front of you?

A. Yes, sir.

Q. You did not consider that dangerous at all, did you?

A. Not if the train was in good condition and nothing sticking out from it, no.

Q. Well, did you expect things might be sticking out from trains sometimes?

A. No.

Q. It never occurred to you that things might be sticking out from trains, such as machinery or something of that kind?

A. Sir?

Q. It never occurred to you, did it?

A. Never could, did you say?

Q. You never thought about anything projecting from the side of the train?

A. No.

Q. You never thought about any wide cars containing automobiles or furniture?

A. No, sir.

Q. Or anything of that kind?

A. No, sir.

Q. You considered it perfectly safe in the daytime to walk along that path with trains moving at a rapid rate of speed within a foot and a half of you?

A. Yes, sir.

Q. Did you consider it safe for you to do that at nighttime?

A. I didn't do it at nighttime.

Q. In complete darkness?

A. I did not do it at nighttime.

[fol. 181] Q. Would you consider it safe to do it at nighttime in complete darkness?

Mr. Hunt: Objected to.

The Court: Overruled.

Mr. Hunt: Exception.

Q. Would you?

A. No, sir.

Q. In your experience in using that path, as one of the citizens of that borough for thirty-nine years, I understand you to tell this Court and Jury that, having seen the path and having seen people walking on it, you would consider it dangerous to walk on that path in pitch darkness?

A. I would not.

Q. When trains were coming toward you?
A. I would not consider it dangerous.
Q. You would consider it perfectly safe?
A. Yes.
Q. There aren't any lights in that whole territory from Rock Street to Hughes Street, are there?
A. Not that I know of.
Q. Well, you know that there aren't any, don't you?
A. No, I could not say for sure.
Q. Well, you know the territory pretty well, don't you?
A. Yes.
Q. Look at these pictures and tell us whether they will refresh your recollection as to whether there are any lights in that neighborhood of any kind at all at night?

Mr. Hunt: To save time, Mr. Kiendl, it is conceded there are no lights.
Mr. Kiendl: All right.

Q. Mr. Schultz, on that concession, there are no lights there?
A. No, sir.
[fol. 182] Q. Pitch black there at night, isn't it?
A. It all depends how black it is; it is clear some night and moon shining.
Q. If the moon is shining there is some light, but if there isn't a moon and no stars, it is pitch black, isn't it?
A. Yes.
Q. Have you been through that territory at night at any time?
A. No, sir.
Q. Never been near there at night?
A. No, sir.
Q. Never in your whole thirty-nine years?
A. No, sir.
Q. Did you see the cylinders on the sides of the locomotives?
A. Yes, sir.
Q. Do you know how wide the ties are at the point where this accident happened?
A. No, sir.
Q. Well, you see them in the pictures, and you have looked at these pictures—about eight feet wide, aren't they?
A. Yes.

Q. Had you noticed when you were walking along the path whether or not there was any overhang from any part of the train beyond the edge of the ties?

A. No, sir.

Q. Well, you mean you did not notice it or that there wasn't any?

A. I haven't noticed it.

Q. Now, when you walked along there with the train coming alongside of you, you looked, didn't you, to see how close the train was going to come to you?

A. Yes, sir.

Q. And could you tell us whether the farthest side of the train, the engine or the cars, came over the edge of these ties?

A. Well, they came over the edge of the ties, certainly.

Q. Yes, they came over about a foot, didn't they, over the edge of the ties?

A. Probably so.

Q. What?

A. Probably so.

Q. That is your best recollection, isn't it?

A. Yes.

[fol. 183] Q. That the farthest side of the engine and cars came over the edge of the ties possibly a whole foot?

A. A whole foot.

Q. Where did you say the path ran? Did it run up against the edge of the ties, as has been testified here before, didn't it?

Mr. Hunt: I object to the form of the question.

Mr. Kiendl: Maybe it is objectionable. I will withdraw it.

The Court: Reframe it.

Q. Did the path that we are talking about, the path that ran parallel to the railroad, did it run along the edge of the ties or did it not?

A. At different points it did.

Q. As you walk along between the main street, you say Rock Street?

A. Yes.

Q. There is a path, and you have walked on it?

A. Yes, sir.

Q. And it goes substantially parallel to the railroad tracks?

A. Yes, sir.

Q. Down to Hughes Street?

A. Yes, sir.

Q. And it is substantially straight, isn't it?

A. It is not exactly straight.

Q. Well, pretty nearly straight as you see it in the pictures here, don't you? I think you picked it out. Substantially straight, doesn't it?

A. Well, yes.

Q. And at most points it runs along the edge of the ties, doesn't it?

A. It does at points, yes.

Q. So that you walk along that path at points where it is close up to the ties?

A. Yes, sir.

Q. A train coming down with an overhang of a foot beyond the point of the ties, a man would get hit, wouldn't [fol. 184] he, if he was walking in by the ties?

A. Yes.

Q. If he were walking on that path, wouldn't he, where the path was close to the ties?

A. If he was close to the ties, yes.

Q. Well, you say the path at points was right up to the edge of the ties?

A. Yes, sir.

Q. At many points along there?

A. Yes.

Q. And with a one foot overhang the overhang would go over one-half of that two-foot path that you have told us about, wouldn't it?

A. Yes, sir.

Q. And even if you walked on the outside of the path and the width of that path, there were points where that one-half overhang would hit you?

A. No, sir.

Q. There were not?

A. No.

Q. It would come awfully close to hitting you, wouldn't it? But you considered it perfectly safe to walk there?

A. Yes, sir.

Q. With trains going forty miles an hour?

A. Yes, sir.

Redirect examination.

By Mr. Hunt:

Q. You have lived, you told me, up Rock Street, even beyond Searle Street?

A. Yes, sir; very nearly a mile.

Q. Almost a mile from this crossing?

A. Yes, sir.

Q. Did you ever have any occasion; did you know anybody down here on Hughes Street or not, during the years you have lived there?

A. Yes, sir.

Q. Well, that would be the only occasion that you would ever have to use that path, would be when you would go over there to make a visit or something?

A. Yes, sir.

[fol. 185] Q. So in other words you did not live right here in this immediate vicinity?

A. No, sir.

Q. Where you could make the same observations that some people who lived there did?

A. No, sir.

Q. Did you go to school, going back to your school days, did you go to the school that is down here east of the tracks?

A. Yes, sir.

Q. And you saw that path in those days, you saw the path that leads down toward the colliery, did you?

A. Yes, sir.

Q. And how long has this general situation existed there?

A. Oh, for twenty years; maybe better.

Q. Did you go visiting in Hughes Street in the daytime?

A. Yes, sir.

Q. Sometimes did you go there at night visiting?

A. Yes, sir.

Q. Over this territory?

A. No, sir.

Q. Which way would you go at night when you went to Hughes Street, around Searle Street and then in?

A. Down Rock Street.

Q. Down Rock Street to Searle Street?

A. Yes. Where I visited the house borders on Hughes and Rock, you can go in either way.

Recross-examination.

By Mr. Kiendl:

Q. I understood you to tell Mr. Hunt that the occasions when you used this territory that we are talking about——

A. Yes.

Q. —where these paths are——

A. Yes.

Q. —you went down to Hughes Street to visit friends?

A. Yes, sir.

Q. And now you tell us you went down to visit friends in Hughes Street at night?

A. I did not say Hughes Street at night.

Q. You did not say Hughes Street at night?

A. No, sir.

[fol. 186] Q. You only visited the friends who lived in Hughes Street at the day time?

A. At nighttime.

Q. But when you went to Hughes Street to visit your friends you did not use the same territory that you used in the daytime?

A. Not at night, no.

Q. You never did, did you, at night; you never used that territory?

A. No, I never used it at night.

Q. At night you always went around the other way?

A. Yes; I would be going down Rock Street.

Q. So that it was daytime when you could see clearly you would go down where these paths were, and at nighttime you would go the other way?

A. Well, it all depended in what direction I was coming from. If I was going over the field, I would use the paths; if I was going down the highway——

Q. Even at night you would use the paths?

A. No.

Q. You never used the paths at night?

A. No.

Q. So it is a fact, isn't it, Mr. Schultz, that when you were going from Rock Street to your friends in Hughes Street at night, you went another way than by these paths?

A. I would be coming down the highway, yes.

Q. Well now, from there over to that, is that a thirty inch pipe?

A. I could not say.

Q. That is about the condition in there, isn't it?

A. Yes.

Q. And then it has a drop in there of approximately two feet off the edge of that road?

A. Yes, in the center of the ditch.

Q. And then you see how this embankment goes up there in this place?

A. Yes.

Q. Did you ever see anybody walking down trying to go through there?

A. No, sir.

Q. The regular place where you citizens use is right up here where we have had it described?

A. The path; yes, sir.

Cross-examination.

By Mr. Kiendl:

Q. You are the Commissioner of Streets of the Village of Hughestown?

A. Yes, sir.

Q. The whole street department, aren't you?

A. No.

Q. Nobody else but you, is there?

A. I take charge of it.

Q. You are the only man in the street department?

A. I am the only salaried man in town.

Q. And your salary is quite a nominal salary, isn't it?

A. That is right.

Q. $150 a year?

A. No, it is $150 a month, twenty-four hour service.

Q. Anyone else in the department but you?

Mr. Hunt: How much service?

The Witness: Twenty-four hours.

[fol. 192] Q. You don't mean you work twenty-four hours?

A. I don't work actually twenty-four hours, but I must be on duty twenty-four hours in case of fire.

The Court: Do you pay out of this $150 any help?

The Witness: No. The borough hires the help when I need men there, the borough council.

Q. You are the only man in the Street Department of the Village of Hughestown, aren't you?

A. Yes, sir.

Q. And the same thing is true of the Police Department, there is one man, isn't there?

A. At the present time. They generally have three, but at the present time there is only one.

Q. And you know the man who was here, Mr. Harrington?

A. Yes, sir.

Q. He was at one time——

A. The Chief of Police.

Q. He was the only man in the Police Department, wasn't he?

A. No; in his time there were two others.

Q. And his salary was $150 or $250 a year, wasn't it?

A. Something like that.

Q. You knew that?

A. I know it is somewheres around that amount. It isn't much.

Q. You have testified before in this case, haven't you?

A. Yes, sir.

Q. In Pittston, Pennsylvania?

A. Pittston, Pennsylvania.

Q. About a year ago?

A. Somewheres around that.

Q. Were you asked about the paths you have talked about this morning?

A. I believe I was, yes.

[fol. 193] Mr. Hunt: Your Honor, I think some juryman might have the idea there was a trial or something in Pittston.

Mr. Kiendl: If you will leave that to me I will see that is brought out and the jury is not deceived about it one way or the other.

Mr. Hunt: All right.

Q. Are you sure you testified in Pittston to the existence of these paths?

A. Yes, sir.

Q. And your testimony was taken with lawyers for the railroad company and lawyers for the plaintiff examining you?

A. Yes, sir.

Q. And you were sworn under oath to tell the truth there?

A. Yes, sir.

Q. And you did tell it, didn't you?

A. Yes, sir.

Q. Now, you told us this morning that you had walked over this territory many, many times?

A. Yes, sir.

Q. When you were asked about that in Pittston didn't you testify that you walked over it very few times?

A. We have done work since then.

Q. I didn't ask about that. Didn't you testify in Pittston that you had walked over it very few times?

A. Yes, sir.

Q. And that was true?

A. Yes, sir.

Q. Now so we get the testimony correct, it is the fact that you testified in Pittston, in February of 1935, isn't it?

A. I suppose it is, if it is there.

Mr. Hunt: It is conceded.

Q. That is conceded to be the date you testified?

A. Yes, sir.

Q. I will ask you once again if you were asked this question: "Have you ever walked along it," referring to this [fol. 194] express land, and your answer "Very few times"?

A. Yes, sir.

Q. So it is the fact up to February of 1935, as the Commissioner of Streets of the Village of Hughestown, you had walked over this strip of land very few times?

A. Yes, sir.

Q. But you have walked over it a great many times since?

A. Yes, sir.

Q. And is it in the same condition now as it was in in February 1935?

A. Yes, sir.

Q. And was it in the same condition in February, 1935 that it was in at the time of the accident in July of 1934?

A. Yes, sir.

Q. It has been in that condition for the last five or ten years, to your knowledge?

A. To my knowledge, yes, sir.

Q. Now, you have told us here today that you have seen people walking along this path alongside the railroad track?

A. Yes, sir.

Q. Many times?

A. Yes, sir.

Q. And has that been since February of 1935 or has it been at all times?

A. At all times.

Q. And that covers a period of about ten years?

A. Yes, sir.

Q. Well, weren't you asked about that when you testified under oath in Pittston, in February of 1935?

A. I don't recall.

Q. Weren't you asked, sir——

Mr. Hunt: What page?

Mr. Kiendl: Page 8, this question at the bottom of page 8.

Q. "Q. When you observed these people walk along this strip of land, was there any particular portion that they [fol. 195] walked upon?" Do you remember being asked that question in those very words?

A. I don't recall.

Q. Was there a stenographer talking down what was said?

Mr. Hunt: It is conceded that he was asked these questions, your Honor.

Q. Well, then, it is conceded that that question was asked you.

A. Yes, sir.

Q. And did you answer, "I never paid them much attention"?

A. I don't recall.

Mr. Kiendl: Is it conceded that he so answered?

Mr. Hunt: Certainly.

Q. Well, if you so answered, that you never paid any attention to the portion of the strip of land where the people were walking, is that true?

Mr. Hunt: I will have to ask the question to be reframed in accordance with the answer "I never paid that much attention."

Q. If it be true that you never paid that much attention to the particular portion of the strip of land where people were walking, was it true?

A. Yes, sir.

Q. And is it true now?

A. Yes, sir.

Q. You always saw them, you told Mr. Hunt, walking along this path?

A. Yes, sir.

Q. Why didn't you testify to that in Pittston?

A. I did testify in Pittston.

Q. Where is the path, Mr. Cook?

A. The path?

[fol. 196] Q. Yes, where is the path?

A. Why, it starts at Rock Street and runs over to Hughes Street.

Q. Does it run along the railroad track?

A. Yes, sir.

Q. And is it one of these paths that curve in and out, or does it run right straight along?

A. No, it follows the line of the track.

Q. It runs right parallel to it?

A. Parallel with the track, yes.

Q. And it is right alongside the track, isn't it?

A. No, I won't say it is right alongside the track.

Q. Well, alongside the ties?

A. No, sir.

Q. Isn't there——

A. No, it differs in places.

Q. Well, at most places it is right alongside the ties?

A. Not in most places, no.

Q. In some places?

A. In some places.

Q. So that you have a path running, we will call it, do you not, from Rock Street to Hughes Street, that runs parallel to the railroad tracks?

A. Yes, sir.

Q. And at some places it is right at the edge of the ties and at other places, it is a little out from the edge of the ties; is that right?

A. In some places it is close to the edge of the ties but not right at the edge of the ties.

Q. Well, within a matter of an inch or two, something like that?

A. Well, it is more than that; six to eight inches in some places.

Q. So in some places at least you as the Commissioner of Streets down there know that this path comes within six or eight inches of the ends of the ties?

A. Yes, sir.

Q. And the distance of that path from Rock Street to Hughes Street is about 120 or 130 feet, something like that, isn't it?

A. Somewhere in that neighborhood; yes.

[fol. 197] Q. And where it is parallel, and I think you said it was parallel all the way down, but where it is parallel, it comes pretty close to the ties or half to three-quarters of the distance as shown in these pictures; doesn't it?

A. From Rock Street toward Hughes, yes.

Q. And that is true of most of it, isn't it, when you walk from Rock Street to Hughes Street along this path?

A. No, sir.

Q. That most of it is right close up against the edge of the ties, within five or six inches?

A. Most of it from Rock Street going over to Hughes on the Rock Street side is close to the ties.

Q. Yes; within five or six inches?

A. I should say six or eight inches.

Q. Six or eight inches; I beg your pardon.

Mr. Hunt: On the Rock Street side?

The Witness: Yes.

Q. As a matter of fact, as you get nearer Hughes Street, it is right at the edge of the ties, as shown in the picture here with the mark on it, is it, Plaintiff's Exhibit 3?

A. Yes, sir.

Q. And where the two paths converge is right about the spot on which I put my pencil, isn't it, the path from Hughes Street up to the track and the path from Rock Street down towards Hughes Street?

A. Yes, sir.

Q. Now, that path at that point you say is within six or eight inches of the track?

A. Yes, sir.

Q. And you say from Rock Street on down to Hughes Street half way the path is within six or eight inches?

A. It varies in places.

Q. About that?

A. Yes, sir.

[fol. 198] Q. Within six or eight inches of the ends of the ties; right?

A. Yes, sir.

Q. And then as you go more than half the distance and you can get nearer Hughes Street, the path runs right along the edge of the ties as shown in the picture, doesn't it?

A. No, sir.

Q. I thought you just said it did. Let's look again.

A. The path widens out.

Q. The path widens out?

A. Yes, the path widens out.

Q. As a matter of fact, it narrows in, doesn't it? I ask you to look at the picture, Plaintiff's Exhibit 3.

A. No. At the intersection here of Hughes, where the Hughes Street path comes up,

Q. Well, the Hughes Street path comes up, according to one witness, the line marked in pencil?

A. Yes, sir.

Q. Do you see that?

A. Yes, sir.

Q. Do you agree with that?

A. Yes, sir.

Q. And the path there is very narrow and right against the ties, isn't it?

A. No, sir; the path widens out naturally from people walking up Hughes Street when they make the turn to come out into Rock.

Q. I am talking about the path coming down parallel with the railroad track, that is narrower at that point than it is at any other point between Rock Street and Hughes, isn't it?

A. No, sir.

Q. And it is not up against the ties as shown in the picture, is it?

A. Within six or eight inches.

Q. It is six or eight inches there too?

A. Yes.

Q. Now have we got that straight, Mr. Cook, that the path that you are talking about starts near Rock Street, runs parallel with the railroad tracks half way down that block within six or eight inches of the edge of the ties?

A. Yes.

[fol. 199] Q. And then continues on down and at the intersection of the two paths it is again within six or eight inches of the ties?

A. It does in places, yes.

Q. Or about that?

A. Yes.

Q. Now, from the center, from the middle of that block down to the intersection of the two paths the average distance of that path from the edge of the ties is about what, six inches, eight inches, ten inches?

A. Oh, I will say more than that; it differs.

Q. Well, what will you say?

A. Oh, a foot.

Q. So the edge of that path is always within a foot of the edge of the ties all the way down there?

A. Yes.

Q. That you are sure of, aren't you?

A. Yes, sir.

Q. And you are testifying as the man who is in charge of the streets of that village?

A. Yes, sir.

Q. At no place is that path further than a foot from the edge of the ties, that you know of?

A. Not if I can recall correctly, no.

Q. Well, you are trying to be very accurate here, because you know it is a serious lawsuit that is being tried, don't you?

A. As accurate as I possibly can; yes, sir.

Q. And with such accuracy as you have, you tell us now that at no point is that path farther than a foot from the end of the ties all the way down to the intersection with the Hughes Street path?

A. Yes, sir.

Q. And at some point it is within six inches of the edge of the ties?

A. Yes, sir.

Q. Now, do you agree that the path is about two feet wide?

A. Yes, sir; except at the intersection.

Q. Except right where the two paths join?

A. Yes.

Q. But all the way down to the intersection point the path [fol. 200] is about two feet wide?

A. About that, yes.

Q. Now, have you walked on the paths?

A. Yes, sir.

Q. Have you walked on them when trains were going by?

A. Yes, sir.

Q. At rapid rates of speed?

A. Yes, sir.

Q. At night?

A. Yes, sir.

Q. And in the daytime?

A. Yes, sir.

Q. And what do you estimate to be the width of that path, about two feet?

A. Somewhere around that.

Q. So that if you were walking on the path and in the middle of it, the side of your body would be within from six to twelve inches from the edge of the ties; isn't that true?

A. Somewheres in that neighborhood.

Q. Now, did you notice that the overhang of engines and cars——

A. I have noticed them.

Q. (Continuing.) —going through were about a foot from the edge of the ties?

A. No, sir; I never noticed that; no, sir.

Q. Well, you heard the last witness testify that he had noticed that there was an overhang of about a foot?

Mr. Hunt: Of a foot what, over the edge of the ties?

Mr. Kiendl: Over the edge of the ties.

Mr. Hunt: Objected to. I submit there is no such testimony here of an overhang except on the engine.

The Court: I don't recall it.

Mr. Kiendl: Well, the witness testified positively to it, your Honor.

The Court: Well, can the stenographer refresh our [fol. 201] memory on that? I don't recall it.

Mr. Hunt: It so happens I know the railroad has the dimensions of every car on this train, and we can get right down to it.

The Court: Are you ready to concede counsel's claim?

Mr. Hunt: I don't know. I thought he was talking about the engine.

Mr. Kiendl: No, I am talking about Mr. Schultz's testimony that the overhang of the engine was one foot beyond the edge of the ties, and I say——

Mr. Hunt (interrupting): The engine?

Mr. Kiendl: I say he testified positively.

Mr. Hunt: That is the engine. That is not what you asked the witness.

Q. You heard the last witness testify that in trains going down through in this territory that there was an overhang of one foot at some point in the train——

A. Yes, sir.

Q. Well, do you agree with that?

A. No, sir; I do not. I can't say I do. I never paid that much particular attention to it.

Q. Oh, you didn't pay that much particular attention to it?

A. No, sir; not to the overhang of an engine or a car.

Q. You never paid any attention?

A. I have noticed it, but not to pay that much particular attention to it.

Q. Well, when you were walking along there at night that was the one and only thing you paid attention to it, wasn't it?

A. Naturally.

Q. And when you walked along in the daytime that was the one thing you paid attention to?

A. Naturally.

[fol. 202] Q. You are accustomed to measurements, aren't you?

A. Somewhat, yes, sir.

Q. In your business?

A. Yes.

Q. As the Commissioner of Streets of this town?

A. Yes, sir.

Q. And do you tell us that you don't know how far these trains would project?

A. No.

Q. Out sidewise over the edge of the ties?

A. No, sir.

Q. You know they project some, don't you?

A. I don't know whether they would project over the ties or not; I could not say.

Q. Well, when you walked along there didn't you notice?

A. I have noticed; naturally I have noticed them.

Q. And you can't tell us anything about any overhang?

A. No, sir.

Q. How wide are the ties there at that point, do you know, Mr. Cook? About eight feet?

A. Somewheres around that, I should judge.

Q. Here they are, in Plaintiff's Exhibit 3.

A. I don't quite get the question.

Q. How wide are those ties, about eight feet wide, or don't you know?

A. About eight or nine feet, I should judge.

Q. That is your best judgment, isn't it?

A. Yes.

Q. Don't you know that the engines that go through there, some of them are ten feet three inches wide and some of the cars are over ten feet wide?

A. No, sir.

Q. You don't know that?

A. No, sir.

Q. You have never observed that?

A. No, sir.

Q. Have you seen trains go through there at night frequently?

A. Yes, sir.

Q. As a matter of fact, Mr. Cook, there are only two trains that go through there at night, as a rule, aren't there?

[fol.203] A. As a general rule, when the collieries are idle.

Q. Two trains a night?

A. Somewhere in that neighborhood.

Mr. Kiendl: That is all.

Redirect examination.

By Mr. Hunt:

Q. Have you seen railroad men use this path, employees of the railroad?

A. Not that I recall.

Q. You don't remember?

A. No.

Q. In regard to your testimony up in Scranton before the Commissioner, you were asked the questions and you made these answers, did you not, sir:

"Q. Have you observed other people walking along that (referring to the path)?

"A. Yes.

"Q. Over how long a period of time?

"A. Over twelve years.

"Q. With kind of frequency?

"A. I could truthfully say very often."

You so testified, didn't you?

A. Yes, sir.

Recross-examination.

By Mr. Kiendl:

Q. You never saw any railroad employees walking in there?

A. Not that I recall. I have seen them walking around there working, but not walking on the path.

Q. Not walking on the path?

A. No, sir.

Q. Where had you seen them walking around there, if not on the path?

A. Well, they generally do their switching on the other side of the Rock Street crossing.

[fol. 204] Q. Let's keep on the north side of Rock Street, the piece of land we are interested in here; you know the piece I mean, between Rock and Hughes Street?

A. Yes, sir.

Q. Have you ever seen any employees on that strip at any time?

A. Yes, sir.

Q. Frequently?

A. I wouldn't say frequently; I have seen them.

Q. Occasionally?

A. Occasionally, at times, yes.

Q. But you have never seen them walking on the path there?

A. No, sir; they are generally on the other side of the track.

A. Yes, sir.
Q. Now give me the minimum and maximum.
A. $21 to $28.
Q. $21 to $28?
A. Somewhere in between those two amounts.
Q. That would be a fair average?
A. Yes.
Q. Now as to the other proposition; the surgeons have sent you a bill, have they not?
A. Yes, sir.

Mr. Hunt: I know this is not strictly in accordance with the rules.
Mr. Kiendl: You know me well enough. Go ahead. Produce the bill.

Q. Do you remember the amount of the bill?
A. Yes, sir.
Q. What is the amount of the bill?
A. The hospital bill was $89 and the doctor was $350.

Mr. Hunt: We will find out.
Mr. Kiendl: Well, if you say that is correct, and you have those bills.
Mr. Hunt: I will have them. That is all.

Cross-examination.

By Mr. Kiendl:

Q. Mr. Tompkins, you had not worked for two months before the accident, or something like that; that is what you told us yesterday, wasn't it?
A. Yes, sir.
Q. And prior to that time you were working about three days a week?
A. Yes, sir.
[fol. 212] Q. For some years back to 1929?
A. Yes, sir.
Q. From 1929 on to 1934 you were working about three days a week?
A. Yes, sir.
Q. And frequently you did not work at all during that time?
A. Right.
Q. For weeks and months at a time?

A. Yes, sir.

Q. Now, you understand that I am asking you about from 1929 on to 1934, a period of five years?

A. Yes, sir.

Q. The truth of the matter is that you were out of work most of the time, isn't that true?

A. No, not most of the time. We would work six months out of the year, anyway.

Q. Six months, working about half the time?

A. Yes, sir.

Redirect examination.

By Mr. Hunt:

Q. Before this depression came on, during these many years you worked up until 1929, up to the end of 1929, what was your average weekly income, or what was the minimum and the maximum?

A. It was about the same.

Q. About the same?

A. Yes, sir.

Recross-examination.

By Mr. Kiendl:

Q. So that your average for all of the time that you worked was somewhere in the neighborhood of $25 a week?

A. Yes.

Q. Mr. Tompkins, is this Mr. Nemeroff, who sits here, your attorney of record?

A. Yes, sir.

Mr. Kiendl: That is all.

[fol. 213] Mr. Hunt: And with that the plaintiff rests, may it please the Court.

Motion to Dismiss

Mr. Kiendl: Then, if your Honor please, the defendant moves to dismiss the complaint in this action.

The Court: Do you want to make this motion in front of the jury?

Mr. Kiendl: It is a matter of indifference, your Honor. Whatever your Honor wants.

The Court: Whatever you want.

Mr. Kiendl: I don't care. Shall I proceed?

The Court: Yes.

Mr. Kiendl: The defendant moves to dismiss, first on the ground that the plaintiff has failed to establish any actionable negligence on the part of this defendant and, secondly, on the ground that it affirmatively appears in the plaintiff's own case that he was guilty of contributory negligence as a matter of law.

I call your Honor's attention to the fact that there is no claim made in the pleadings here that this is a case of wilfull, wanton and reckless negligence such as we sometimes know of, but even if the claim were made we would move to dismiss the complaint on the clear ground that there is no testimony not even a scintilla of evidence, to support that theory.

On all these grounds we press our motion to dismiss this complaint. We think the best that the plaintiff can possibly contend for is that he has raised some slight scintilla, and that scintilla rule is not adopted in the Federal Court. I [fol. 214] have furnished your Honor with the authorities. I do not want to discuss them more than to say that.

The Court: I have read them, and I shall continue reading them.

Mr. Kiendl: I do want to call your Honor's attention to the fact this permissive pathway doctrine is not applicable in this case under the decisions of the highest courts of Pennsylvania and under the decisions of our Circuit Courts.

The Court: I will deny your motion.

Mr. Kiendl: May I have an exception?

The Court: Surely.

Mr. Kiendl: On each and every one of the grounds?

The Court: Yes.

Mr. Kiendl: Will the engineer take the stand. Some of the jurors would rather have the adjournment. I don't mean to impose my will on anybody.

The Court: No, you are not imposing will at all. You can proceed.

Mr. Kiendl: If the jurors desire it, of course I am perfectly satisfied.

Mr. Hunt: We have only got twelve minutes.

The Court: Are all hands agreed, then, that we adjourn? Try to be back at two o'clock sharp.

(Recess to 2:00 p. m.)

[fol. 215] Afternoon Session—2:00 P. M.

MICHAEL BERNARD MCGRATH, called as a witness on behalf of the defendant, being duly sworn, testified as follows:

Direct examination.

By Mr. Kiendl:

Q. Mr. McGrath, where do you live?

A. My home is in Allentown; I board at Ashley, Pennsylvania.

Q. And by what company are you employed?

A. Central Railroad of New Jersey.

Q. And how long have you been in the employ of the Central Railroad of New Jersey?

A. May 13, 1923.

Q. And from May 13, 1923 what job have you had with the Central Railroad?

A. Started out as car checker, interchange clerk and freight clerk and freight clerk now, freight station clerk.

Q. Freight station clerk at what point?

A. At various points.

Q. What was your position in July of 1934?

A. Night clerk at Ashley Station.

Q. And is that Ashley Station in Pennsylvania?

A. Yes, sir.

Q. And as night clerk at that Ashley Station in July, 1934, what were your general duties?

A. Way billing coal, taking care of the freight bills and checking the Erie train in and out.

Q. You were checking trains coming in and going out; is that part of your duties?

A. Yes, sir.

Q. Did you ever hear of a train called the Ashley Special?

A. The Erie train.

[fol. 216] Q. The Erie train, yes sir.

A. That is how we refer to it.

Q. Now, did your duties in July of 1934 include checking that train when it came in from Avoca?

A. Yes, sir.

Q. And on the night of this accident, or early in the morning of July 27, 1934, were you on duty as night clerk?

A. Yes, sir.

Q. And performing your duties as such night clerk down there at Ashley?

A. Yes, sir.

Q. Did this Erie train, the Ashley Special, come into Ashley that morning?

A. Yes, sir.

Q. Do you know about what time?

A. Yes, sir; I have a book here, my seal record.

Q. Have you a recollection aside from your book?

A. My seal record book, which is in my brief case.

Q. Will you get your brief case, or can I get it for you?

A. Yes, sir.

(Brief case produced.)

Q. What time did that train get in, do you know?

A. It cleared Ashley yard at 4:50 a. m.

Q. 4:50 a. m.; and did you have anything to do with that train after it cleared the yard?

A. It is my duty to take the record of the initial and number and the seal records on the car.

Q. And did you perform that duty that morning?

A. I went completely around the train.

Q. Will you tell us what you mean when you use the words "seal record." What is a seal record?

A. A seal is a seal that is applied on the door after it is shut, and the seal is applied in order to keep it intact.

Q. And it was your job to inspect the seals on these cars?

[fol. 217] A. Inspect them and also take a record of them.

Q. And make a record of them?

A. Yes, sir.

Q. You did inspect the seals on this train; you did make a record of them?

A. Yes, sir.

Q. Have you the record there before you?

A. There is the complete train (handing book).

Q. And is that record made by you in your own handwriting?

A. Yes, sir.

Q. And was that record made by you in the performance of your duties in the regular scope of your duties?

A. Yes, sir.
Q. At Ashley, Pennsylvania?
A. At Ashley, Pennsylvania.

Mr. Kiendl: I offer that record in evidence.
Mr. Hunt: No objection.

(Marked Defendant's Exhibit E.)

Q. This is the original seal record book?
A. Yes, sir.

Mr. Kiendl: Now may I go to the witness stand, your Honor, so I can make this as clear as possible?
The Court: Certainly.

Q. The record in this book marked Defendant's Exhibit E, consisting of two pages, the second page marked Defendant's Exhibit E in the seal record book is the record of the Central Railroad Company of New Jersey, is it not?
A. Yes, sir.
Q. And that shows, does it not, the initial, the number and the seal record of every car in that train?
A. Yes, sir.
[fol. 218] Q. Do you know offhand, without counting, how many cars there were in the train?
A. Thirty-eight.
Q. Thirty-eight cars?
A. Thirty-eight cars; yes, sir.
Q. Does that include the locomotive or the coal tank or the caboose?
A. No, that only includes the train.
Q. The train?

The Court: Wasn't there testimony that this was a forty-train car?
Mr. Kiendl: I said in opening to the Court that the train consisted of about forty cars. Thirty-eight cars, the caboose is thirty-nine, and the coal tender would be forty.
The Court: All right. Pardon me.

Q. All right. Now will you describe to the jury, Mr. McGrath, just what you did when that train got in and cleared the yard? Do you mean by that that it came into the yard and the Erie was through with it?
A. When it gets on our tracks, Jersey Central is responsible for it.

Q. And when they were on the other side of the track, the part that we are talking about, you never saw them walk on the path there?

A. Not that I recall.

Q. Where did they walk all over that place?

A. I could not say.

Q. Well, you have seen them there, now, haven't you?

A. Yes, but on the other side of the track where I have seen them.

Q. I am talking about this side of the track; I thought I had made that clear to you.

A. Yes.

Q. North of Rock Street?

A. Yes.

Q. Between Rock and Hughes Street?

A. Yes.

Q. On the west side of the track between the track and the fence?

A. Yes.

Q. During the years that you have been there have you seen railroad employees in there?

A. I can't truthfully say that I have.

Q. Well, you know you have, don't you, Mr. Cook?

Mr. Hunt: Your witness tries to be truthful and says, "I can't remember," and counsel says, "Why, you know you have."

[fol. 205] Mr. Kiendl: Well, I conceive that to be cross-examination, your Honor. Maybe Mr. Hunt can educate me.

Mr. Hunt: Well, don't you believe the man when he says he can't remember that, Mr. Kiendl, seriously?

Mr. Kiendl: No, I don't believe him, seriously, at all; I am perfectly plain about it.

The Court: Objection overruled.

Q. Don't you know that there are railroad men in there all the time?

A. No, sir.

Q. Well now, let's see. You know that there are mines close to Rock Street, don't you?

A. Yes, sir.

Q. And you know that coal cars come out of the mines and go into the side track to the south of Rock Street, don't you?

A. Yes, sir.

Q. And you know that cars are switched in and out there all day long in the busy seasons, don't you?

A. Not all day long, no.

Q. Well, at any part of the day?

A. Part of the day.

Q. And they are switched around by railroad employees on the cars, particularly brakemen, firemen, engineers and conductors?

A. Yes, sir.

Q. And that trains may come over Rock Street and then the switch is thrown and they go back into the switch, don't they?

A. Yes.

Q. And you have seen that done many, many times?

A. Yes, sir.

Q. And the switch that I am referring to, the point of the switch, is right at Rock Street, isn't it?

A. Close to it there; yes, sir.

Q. Right at the crossing, as shown in this picture?

A. Yes, that is true.

[fol. 206] Q. And there are other tracks to the south of Rock Street, aren't there?

A. Yes, sir.

Q. How many are there, four or five altogether?

A. Three, I think.

Q. Three. Now, you have seen cars come from south of Rock Street with the engine, go up over Rock Street to the north, with railroad men on them, haven't you?

A. Yes, sir.

Q. And you had seen those cars switched back on the tracks?

A. Yes, sir.

Q. To the south of Rock Street?

A. Yes, sir.

Q. Do you say now that you never saw any railroad men on the west side of the tracks in the territory that we are talking about between Rock and Hughes Street during all the time that you have been there?

A. No, sir.

Mr. Hunt: Walking or riding on a train?

Q. Never saw them in there at all?

A. No, sir; not that I can recall.

Redirect examination.

By Mr. Hunt:

Q. And this switching operation, these brakemen when you have observed this switching operation by a train pulling across Rock Street and then coming back on the other line, any brakeman on that train, was there any occasion for them to be walking or were they on the train, or don't you know?

A. Naturally if they are switching back into them switches, into them branches, if they are going to come back, or no matter which direction they are going to go, the brakeman is always on the opposite side of the track to throw the switch.

Q. Isn't the only man that gets off the train in an opera-
[fol. 207] tion of that kind,—you know as a layman, without being an employee or an attorney, you know the only man that is off that train is the man that is to operate the switch, don't you?

A. Yes, sir.

Mr. Hunt: That is all.

Recross-examination.

By Mr. Kiendl:

Q What were the men doing walking on the other side of the track, then, that you saw, that is the railroad employees that you told us about a few minutes ago?

Mr. Hunt: This witness answered that he cannot remember whether he had ever seen any railroad men walking north of that crossing.

Mr. Kiendl: Quite the contrary.

Q. Didn't you tell us that you saw the railroad men walking, but on the other side of the track?

A. On the other side, yes.

Q. North of Rock Street between Rock and Hughes Street-?

A. I don't quite understand your question.

Q. What is there about it that you don't understand?

A. Are you referring to that piece of ground that is in between Hughes and Rock?

Q. Yes.

A. On the west of the track?

Q. No; now I am referring on the east of the tracks.

A. I see. Yes, I have seen men there.

Q. You have seen railroad men walking in there time and time and time again?

A. Yes.

Q. What were they doing?

A. Signalling to the engineer.

[fol. 208] Q. And you have seen men right alongside of the track, railroad men, down on the ground?

A. Yes.

Q. Walking and giving signals?

A. Yes, sir.

Q. Hadn't you seen the same thing on the other side of the track?

A. No, sir.

Q. Not once?

A. No, sir.

Mr. Kiendl: That is all.

Mr. Hunt: That is all.

Your Honor, may I recall Mr. Tompkins just for a few questions that I neglected to ask?

Mr. Kiendl: Let me ask this witness a few more questions, your Honor.

The Court: Yes.

By Mr. Kiendl:

Q. When you saw them giving signals to the engineer, where was the engine, up towards the Avoca end?

A. Avoca?

Q. Up toward Avoca?

A. Yes, sir.

Q. And, as a matter of fact, from the side of the track on which you saw the men give the signals, the engineer would be on the opposite side, wouldn't he?

A. No, sir.

Q. Don't they sometimes push those cars down into the tracks, as well as pull them down, the locomotive?

A. Yes.

Mr. Kiendl: That is all.

Mr. Hunt: Now I will straighten that out.

Mr. Kiendl: No; you will try to.

Mr. Hunt: And I probably will.

[fol. 209] Redirect examination.

By Mr. Hunt:

Q. You see Avoca is, as you look into this picture, Defendant's Exhibit A, Avoca is looking into the picture, isn't it?

A. Yes, sir.

Q. And that is looking towards the curve, isn't it?

A. Yes, sir.

Q. The curve?

A. Yes, sir.

Q. Now, the engine was towards Avoca?

A. Yes, sir; facing Avoca.

Q. Now, if a man stood on the lefthand side of the track no engineer could see him, could they?

A. No, sir.

Q. So that in order for the engineer to see this signal you told the jury about when the train went around the curve he would have to be on that righthand side?

A. Yes, sir.

Mr. Hunt: I mean anybody can see that; I mean Mr. Kiendl with his railroad——

The Court: He has testified.

Mr. Hunt: That is all.

Mr. Kiendl: May I have that little picture?

Mr. Hunt: Yes (handing).

Recross-examination.

By Mr. Kiendl:

Q. So that we will know what we are talking about here, Mr. Cook, this picture, Plaintiff's Exhibit 5, shows the track going down toward Ashley, doesn't it?

A. Yes, sir.

Q. And that shows the track on the west side of the—the land on the west side of the track?

A. Yes.

Q. And on the east side of the track?

A. Yes, sir.

[fol. 210] Q. You say the railroad men give their signals here on this side (indicating)?

A. Yes, sir.

Q. And never——

A. (Interrupting) I had never seen them over there; no, sir.

Q. Are you sure of it?

A. Positive.

Q. Why did you say a few minutes ago you did not remember seeing them there, and now you are positive that you never saw them there?

A. You asked me giving the signals. I never seen a railroad man giving the signal from that side of the track; no, sir.

Mr. Kiendl: That is all.

HARRY JAMES TOMPKINS, recalled, further testified as follows:

Direct examination.

By Mr. Hunt:

Q. Mr. Tompkins, I neglected to ask you about your earning capacity up to the time that you were injured. Tell us about your wages; were they the same every week or was there a variation?

A. There was a variation.

Q. And I want you to tell us the minimum and the maximum, and in that way we can judge what is a fair average.

A. Well, between $7 and $7.50.

Q. Yes.

A. Per day.

Q. Now, you are taking the day, or what?

A. By the day.

Q. And what did that total up to? We don't know what hours you worked a week, so that if you will give it to me by the week, what was your average income, your minimum in-
[fol. 211] come a week, and your maximum?

A. Well, some weeks we would work three days and some weeks four.

Q. I am trying to get your wages when the plant was running.

A. Yes.

Q. You could rely upon about so much money per week, could you not?

A. Well, I started at the 14th car here. I had it sort of split.

Q. So it was the 8th car from the engine. Now, starting from the engine back, do I understand that your record shows that the first car that was a reefer was the 8th car?

A. Wait a minute. I want to get that straight.

Q. Oh, yes, we want to get it absolutely straight.

A. This MDT; is that the one you are questioning?

Q. Yes.

A. That was the 8th car from the rear of the train, from the caboose.

Q. That is what I thought.

A. The 8th car from the caboose. You see I have this split up here.

Q. Now we want to get them in order. From the caboose to the first reefer there were eight cars?

A. Yes, sir.

Q. And that first reefer was 4011?

A. Yes, sir.

Q. Now, the next one going forward to the engine, can you get that one?

A. 15th car from the engine, 85412.

Q. The 15th car from the engine. You see that doesn't help us. The first one was the 8th car from the caboose?

A. Yes.

Q. Here you went from the caboose up to the engine.

A. The next car would be 26643.

[fol. 226] Q. Now, how far in front of the first reefer was this second one?

A. 17th car.

Q. The 17th car from the rear end?

A. Yes, sir.

Q. Where was the next reefer going up toward the front end, 85412?

A. Did I say the 17th?

Q. Yes. I think that is right.

A. 24th car.

Q. So you have a record on this train of three reefers, one eight cars from the caboose, one seventeen cars from the caboose and one twenty-four cars from the caboose; right?

A. Yes, sir.

Q. And in front of that first reefer that was twenty-four

cars from the caboose, there were fourteen cars, none of them being reefers?

A. No, sir.

Q. There were no other reefers in that train?

A. No, sir.

Q. Now taking the three reefers that were in the train, tell us whether or not they were sealed?

A. These three reefers that I have read were sealed with foreign railroad seals.

Q. Both sides?

A. Yes, sir.

Q. North side and south side?

A. North and south sides. My records show that they were correct, and if they were not, I would apply seals.

Q. There were unbroken seals on the doors on both sides of each of those reefers?

A. Yes, sir.

Q. Your record shows that?

A. Yes, sir.

Q. Now, will you point out these three cars to me?

A. There is the MDT.

Mr. Kiendl: May I put a circle around each one of the three reefers, so that the jury will see which ones they are, in lead pencil?

The Court: Do I understand you to say, Mr. McGrath, that the first fourteen cars from the engine not one of the fourteen cars was a reefer?

[fol. 227] The Witness: The fourteen cars from the caboose.

The Court: The fourteen from the caboose?

The Witness: You see I start from the rear end of the train to check. This is the 8th from the rear.

Mr. Kiendl: Let's make that clear if your Honor is confused about it. I will go over it again.

Q. Now, where is the second one?

A. That is URT 85412, and then 26643.

Q. Now, Mr. McGrath, the Court was confused, and probably the jury is, as to just where these three cars were on this train. On your list, the first reefer that I have marked in pencil is four cars from the top of your list?

A. Yes, sir.

Q. Does that mean it was the fourteenth car on the train?

A. No, sir; I started at the fourteenth car from the rear end. That would give me the balance of the train in front, see. This here (indicating), is the car that was next to the caboose.

Q. There, 3133?

A. Yes, sir.

Q. Well now, you start at the 14th car and listed the cars as you went to the front in the order in *in* which you inspected them?

A. Yes, sir.

Q. And not in the order in which they were in the train?

A. No, as they were standing.

Q. Well now, I think you told us that 4011, one of the three reefers, was eight cars from the caboose?

A. Yes, sir.

Q. Is that definitely right?

A. Yes, sir.

Q. Eight cars from the caboose?

A. Yes, sir.

Q. And then you told us that the next car going forward was the 17th car?

A. 26643; yes, sir.

[fol. 228] Q. And then you told us still going forward, as I understood you, that the 24th car was 85412?

A. Yes, sir.

Q. And in front of 85412 there were fourteen more cars; that is right, isn't it?

A. Yes; this is the 24th; then there is——

Q. That is the 24th, and there were 38. That would give a balance of 14. Fourteen cars in front of that?

A. Yes, sir.

Q. And none of those fourteen cars were refrigerator cars?

A. No, sir.

The Court: That is what you would call reefers?

The Witness: Yes, sir.

Mr. Kiendl: Now may I show this book to the jury, if your Honor please. This is the record we have just been talking about (handing to jury).

Juror No. 12: May I ask if a refrigerator car is the only car that has hinged doors?

The Court: Will you answer that?

The Witness: Why, I believe it is.

The Court: Did you get the question?

The Witness: Yes, sir; the only car with hinged doors; it is the cars that have a double door that open out towards you.

Juror No. 12: Yes; but it is a hinged door?

The Witness: Yes, sir. I don't know whether there is any other cars that have hinged doors. All other cars seem to slide on rollers.

The Court: Does that answer your question?

Juror No. 12: Yes.

Juror No. 4: May I ask, is there any notation here to [fol. 229] show how each car was numbered; I mean the standing behind the engine or from the caboose?

The Witness: No, there is no notation there. I say that I started checking the train at the fourteenth car from the caboose, and there is thirty-eight cars in the train.

The Court: Does that answer your question, Mr. Juror?

Juror No. 4: I think so.

Juror No. 12: How does he know that this is the fourteenth car? Is there any notation on here?

The Witness: I looked at my train list before I came down.

Mr. Hunt: Where is the train list?

The Witness: The train list is at Ashley, Pennsylvania, the copy that I get from Keller.

Juror No. 1: Is it customary to start in the middle of a train?

The Witness: I did that for my own purpose, in order that I did not have to take those extra steps where there is so many empty cars. I would try to cut in on the first loaded car and then go around and circle around that way. You see the rear end had about six or eight tank cars, I don't know just how many, so I cut in there and got a seal first on this particular car and I was down in that direction in order to walk up to the head of the train, or the rear of the train.

Q. Mr. McGrath, you talked about a train list. When the Ashley Special comes into Ashley——

A. Yes, sir.

[fol. 230] Q. Do you get a copy of the train list from the conductor?

A. Yes, sir.

Q. That is what you mean?

A. It is up to me to take a seal record of every car in order to have a per diem record, and we have to get a seal record on account of damages and robberies and other things.

Q. When the train came into your yard, came into the jurisdiction of the Central Railroad Company of New Jersey, the train consisted of thirty-eight cars?

A. Yes, sir.

Q. And you inspected those cars?

A. Yes, sir.

Q. Now, how did you inspect them? Did you go to the head end of the train and go down one side and come up the [fol. 219] other, or tell the jury just what you did.

A. I started at the fourteenth car, as my record will show there, the first car; that was a box car. I had to get a seal record.

Q. Let's see if we can get the number of that car from this book, the fourteenth car?

A. It is this car (indicating), Erie 76315.

Q. Well now, do you mean by that that that was the fourteenth car from the head end as the train came in?

A. From the caboose.

Q. From the caboose?

A. Yes.

Q. And that was the fourteenth from the rear end of the train?

A. Yes, sir.

Q. After you started out, and as the train was standing there, you went to this fourteenth car from the rear end?

A. Yes.

Q. Then how did you proceed from the fourteenth car; did you go to the front or to the rear?

A. I went to the front of the train, took the initial and number and the seals of the car, and walked right beside the car.

Q. You went to the fourteenth car and took the initial, number and seal of that car?

A. That particular car, and then kept on taking the record.

Q. That is you went along to the front of the train?

A. Yes, sir.

Q. Then what did you do, go down the other side?

A. I went around the train.

Q. Let's see if we have your course so that the jury understand it. Thirty-eight cars standing on the track; you went to the fourteenth from the rear end?

A. Yes, sir.

Q. Then you proceeded along the side of the cars to the front end?

A. Yes, sir.

Q. Then you came around and down the other side of the cars?

A. Yes, sir.

[fol. 220] Q. Down around the rear end and back to the fourteenth car?

A. Yes, sir.

Q. So you covered the entire train?

A. Yes, sir.

Q. And both sides of the entire train?

A. In order to get the seal records from both sides.

Q. And you took the seal records on both sides?

A. Yes, sir, we do.

Q. It was about what time you did this? You said the train cleared at 4:50, as entered here?

A. That is my time that I started checking, as soon as the train stops I time them and start checking.

Q. 4:50 a. m. on July 27th. Was that daylight?

A. In July I believe it would be; yes, sir.

Q. And when you got to the fourteenth car did you write down in your book the initial and the number of the seal record on the north and the south sides of that car?

A. Yes, sir.

Q. And that is the first one that appears in this Exhibit E, is it not?

A. It is the fourteenth car, and that is what I started, on the north side, as it is indicated, and there is the south side (indicating).

Q. I see. When you got to the north side you put down the seal record of that car, Sharon 66088, did you not?

A. Yes, sir.

Q. So on the door of that car there was an intact seal, is that what it means?

A. Correctly applied, yes, sir.

Q. And when you got around, if you went around to the other side, you found an intact seal there?

A. 67233.

Q. And for every car that had seals on you made that record?

A. Yes, sir.

Q. The seals are always at the car doors, are they not?

A. Yes, sir.

Q. The second car you have here is TCX 2397?

A. That is correct.

[fol. 221] Q. That is correct, isn't it?

A. Yes, sir.

Q. What kind of a car is that?

A. That is a tank car.

Q. And did you make a note on that "T" for tank?

A. Yes, sir; that is to indicate what kind of a car it is.

Q. And where you have a T in this record against any car, that indicates that it is a tank car?

A. Yes, sir, and if it has cards on it, I make the necessary notation. If it is inflammable or acid, or whatever the case may be.

Q. And of course a tank car consisted of a tank to carry oil or gas or something of that kind and hasn't any freight car doors on it?

A. No, sir.

Q. And when you put on your record under the seal record "B," that means box car, does it not?

A. Yes, sir.

Q. Now, as you examined that train of thirty-eight cars, can you tell this jury whether or not any car of the thirty-eight, refrigerator car, box car, tank car, or any other car in that train, had any door swinging open?

A. Well, I came around the train and I am very close to the train, I can't exactly say how close, but close enough to notice them, and I did not notice anything on either side of the track.

Q. If you had noticed any such condition on any car door of any of the thirty-eight cars of that train, did you have any duty to make a note of it?

A. Oh, yes. If the cars would be open, in the case of a refrigerator door, it is my business to shut it, and we had a ruling then to seal them. Of course that has been done away with since.

Q. Now, you say you didn't see any car door open on any of these thirty-eight cars?

A. No, sir.

Q. As you examined these various cars you found some [fol. 222] that were empty, did you not, and some that were loaded?

A. Yes, sir.

Q. The empty cars, would the doors of those cars be sealed or would they be unsealed?

A. Some doors would be sealed, that is one side probably would be sealed, because when they empty a car they usually use the one door as a rule.

Q. They empty it only from one side?

A. From one side, yes, sir; and I would find cars that would be sealed cars that would have the doors open, and it was up to me to find out whether or not there was anything in the car.

Q. It was part of your job to see whether there was anything in the car which proved to be an empty car?

A. Yes, sir.

Q. Did you examine the doors, the open doors, the doors that were not sealed, of the empty cars?

A. Yes, sir.

Q. To see if the cars had any contents?

A. Yes, sir.

Q. And did you find any of the doors that were open on any of those cars in any defective condition of any kind?

A. No, sir.

Q. Well, is it the fact, then, Mr. McGrath, that these thirty-eight cars in the train, those that were loaded, all had intact seals on them?

A. Yes, sir; there was nothing to dispute the train at all, the seal records.

Q. And those that were empty you tried to open the door of each of the empty cars, leaving out the tank cars?

A. Yes, sir, to make positive that they were empty. There is times when we find cars that come on empty bills that have contents in the cars. That is what we are to do, is to find out if they are empty or loaded.

[fol. 223] Q. Now, I see in green pencil or green ink in Defendant's Exhibit A a circle around a car W. & L. E.

A. Wheeling & Lake Erie.

Q. 29124?

A. Yes.

Q. Did you put that red ink circle around it?

A. That is a blue pencil mark.

Q. Now, will you tell us what that signifies and why that is there?

A. The reason for that is that the car got billed to Ashley as a loaded car of merchandise, Ashley, Pennsylvania, but Ashley is not a transfer point. It was necessary to find out what was in the car and determine the destination of the contents, so I had to break *the* both seals on this car, and I show the seals that I took off and the various sides I have taken them off from, and I show my application of seals also.

Q. You made a record of that in your book because of the fact that you broke the seals?

A. Yes, sir.

Q. To find out where the car was routed to?

A. Where the contents were destined to.

Q. So that you could arrange for the further transportation of that car?

A. Yes, sir; expedite the movement.

Q. And you made a note in your book, Defendant's Exhibit A, reading as follows: "This car received on memo bill marked Merchandise. Opened car on arrival W. L. E. 29124, applied N 763495 north side, applied N 763490 south side."

A. Yes, sir.

Q. "Took off W. L. E. 403345 north side, took off W. L. E. 403368 south side. Destination originally Plains Junction, delivered to Ashley, Pennsylvania."

A. Yes, sir.

Q. Did you make that notation that I have just read to you in full at the time or immediately after the time of [fol. 224] your inspection of the seal records and so on of that train?

A. I made it at the time or shortly afterwards when I got up to the office. It is my duty to take a record of it and I had to make a notation to keep the record straight about the seals.

Q. I did not ask you about the letter G that appears in the seal record that is against one car. What does that mean?

A. That is a gondola, an open top car.

Q. Will you look at that list yourself, Mr. McGrath, and before you look at it, in the performance of your duty as a railroad man that you have told us about, have you heard

the expression regarding railroad cars, the expression "reefer"?

A. Refrigerator; yes, sir; reefer.

Q. Railroad men called the refrigerator cars reefers, do they not?

A. Yes, sir.

Q. Now will you see in that list of cars how many, if any, reefers there were in that train?

A. I see three here. Do you want the list of them?

Q. If you will give me the numbers of them I will appreciate it.

A. Union Tank Line—U. R. T. is the initial.

Q. Yes.

A. 26643. URT——

Q. Just a minute. 26643?

A. Yes, sir. It probably is the——

Q. I have it.

A. URT 85412.

Q. Yes?

A. And MDT 4011.

Q. Now, do you know the position in the train of URT 85412?

A. 85412?

Q. Yes.

A. About the 26th car.

Q. From which end?

A. From the rear end, the caboose end.

Q. From the caboose end?

A. Yes, sir.

Q. How many cars did you say there is?

A. Thirty-eight cars in the train.

[fol. 225] Q. Yes; and that was how many cars from the rear?

A. 25th or 26th car; is that correct?

Q. Somewhere along there.

A. Yes, sir.

Q. And where was the next refrigerator that you speak of, 26643?

A. 26643. Well, that should be close to the hind end, the rear end, about the 17th car from the rear end.

Q. About the 17th; and where was MDT 4011?

A. The 8th car from the engine, is it not?

Q. The 8th car from the engine. I don't know; I want to——

A. It is located right near Track 7, down in the yard.

Q. You have Tracks 6 and 7 over here, have you?

A. Yes, sir.

Q. Over near Track 7 there is a building?

A. Yes, sir.

Q. That is where, when you had a little time yourself, you go in there and rest; is that right?

A. Yes, sir.

Q. Now, you had finished your work, obviously, if you got there at four o'clock, you had finished your work on this outgoing 4 track in about ten minutes?

A. Yes, sir.

Q. Twenty-one cars?

A. Yes, sir.

Q. Now, there came a time when you either heard or somebody told you the Erie was in?

A. Oh, I get a report of the time he leaves Avoca.

Q. Well, you got a report that he left Avoca on this morning at ten minutes after two, didn't you?

A. No. He goes in service and waits for a connection to come from Susquehanna.

Q. Well, I mean you are over here in the shanty now, resting?

A. Yes, waiting for him to come in.

Q. And while you are over in the shanty resting you are advised in some way that the Erie is in?

A. Well, I know when he arrives.

Q. How do you tell that?

A. Why, mainly through his blowing of the engine. That is a big whistle other than a Jersey Central engine.

Q. You mean the blowing——

A. A big whistle.

Q. So that you are over here in the shanty around about four-fifty and you hear a big whistle, and you say that is the Erie?

A. Not at four-fifty.

[fol. 240] Q. I thought you said he came—didn't you say——

A. He clears the yard.

Mr. Kiendl: He said he cleared and stopped at four-fifty.

The Witness: He cleared and stopped, his train stopped. That is the time I start checking, at 4:50.

Q. Well, what time did he get in the yard?

A. His rear end cleared the yard at 4:50 a. m.

Q. Yes; and when you say cleared the yard, you mean——

A. All the main switches.

Q. That means he got his entire train in on Track 4—that is a simple way of putting it, isn't it?

A. Yes.

Q. And that was at 4:50?

A. Yes, sir.

Q. And you were still over in the shanty?

A. No, sir.

Q. Had you left the shanty?

A. Yes, sir.

Q. And you started walking how far east from the shanty over to cross these outgoing tracks, across the main track and over to track 4; how long a distance is that?

A. Oh, I would say about five minutes.

Q. You say that shanty is—No. 7 track is—being located alongside of Track 7 and Track 7 doesn't start for some considerable distance above this main junction down here, does it?

A. Yes, Track 7 is a shorter track, yes, sir.

Q. It starts away up the line?

A. No, it starts down here. That is what we call a leader.

Q. At any rate, that shanty is opposite 7?

A. Yes, sir; right parallel; right adjoining it.

Q. Did you know what track this Erie was coming in on?

A. No, I don't know.

[fol. 241] Q. You just went over there to look?

A. I went over and just checked it when he stopped.

Q. I mean you just walked over there and did not know what track you expected to find it on?

A. Sure I did. I got the bills from the conductor and gave him my bills, and I know what cars to check.

Q. I know, but did you know what track—did you know whether he was going on 3 or 4 or 5?

A. There is only two tracks he can come in on, 3 or 4.

Q. So you knew you would find him on either 3 or 4?

A. Yes, sir.

Q. When you got over—you remember this particular night, do you?

A. No.

Q. And you hadn't heard anything about any accident at that time, had you?

A. No, sir.

Q. This Erie train was how many cars long?

A. Thirty-eight.

Q. And it had the caboose and the tender and the engine in addition?

A. Yes, sir.

Q. Each car is approximately how long?

A. Oh, they run anywhere from—well, that would be up to the car department to know that, but I would say about forty feet, some of them run sixty-five feet.

Q. Well, your average car is sixty feet, isn't it?

A. No, I would say the——

Q. Isn't the average car sixty feet?

A. No, sir.

Q. Is the average car fifty feet?

A. There is no average.

Q. The average car is forty feet; I will stand corrected.

A. Around that; yes, sir.

Q. Some are longer than that?

A. Oh, yes; they are up to sixty-five feet, gondolas.

Q. So that you had a train about—forty times forty, a minimum of 1600 feet long?

A. Yes, sir.

[fol. 242] Q. 1600 feet on one side, 3200 feet walking both sides?

A. Yes, sir.

Q. You told these gentlemen you did about the same thing on the outgoing train as you did on the incoming?

A. Yes, sir.

Q. Correct. Had to make your same record?

A. Yes, sir.

Q. And you had twenty-one cars that you did in ten minutes; did you?

A. Yes, sir; but I want to correct you on that.

Q. You want to correct me?

A. I want you to understand it. It takes more time to take seals and car initials and numbers than it does to take just single car and initial as I did in the twenty-one cars, see? You will take notice of that. Here these are all seal records and those additional records.

Q. Yes. Now, when you are pointing to here, which train are you pointing to?

A. This is the inbound train. Here is the outbound train that I took, as we say, in ten minutes.

Q. Yes.

A. Notice how many seals are there?

Q. Yes; how many are there, and how many on the in train? As long as you have called it to my attention, you say you can tell from this how many seals are there and how many are not there, can you?

A. Yes, sir.

Mr. Hunt: This page, gentlemen, that he has shown me, for twenty-one cars, has that amount of hand-writing on it (indicating). The amount you see that he took in ten minutes, and the other—is this one page or two pages?

The Witness: That is the entire page.

[fol. 243] Mr. Hunt: Yes, and the same amount at any rate taking the same amount, we find over here; in other words, taking down to that total that would take us down to this line here, you can see how much writing that page has on it in proportion, going down as far as that (indicating). That seems to be a little heavier in here.

Q. Now, Mr. McGrath, there isn't any question, you have thought it over and you have thought it over not once but twice, as to the reasonable length of time, knowing your experience that you have had, that it took you ten minutes to walk both sides of the twenty-one cars and do this writing; correct?

A. Yes, sir.

Q. And you got that all done in ten minutes' time, and I have asked you that three times, and you said that was true?

A. About ten minutes; yes, sir.

Q. Now, twenty-one cars average forty feet?

A. Forty feet to a car.

Q. Now then, you notice, since you have called it to my attention, you notice on the page over here, and just help me a minute.

A. Yes, sir.

Q. That is what you did?

A. Yes, sir.

Q. You inspected that train in ten minutes; twenty-one cars?

A. Yes, sir; and checked the seals.

Q. Is it the sort of a thing that I show you now? Is this what you mean by a train list?

A. Yes, sir; that is what we call the passing record.

Mr. Kiendl: I ask to have this train list marked for identification, and I will offer it in evidence if you will concede it is the train list, Mr. Hunt.

Mr. Hunt: May I see it?

Mr. Kiendl: Surely (handing).

Mr. Hunt: Is this the list he gets?

Mr. Kiendl: He gets a copy of this.

Mr. Hunt: From whom?

Mr. Kiendl: From the conductor.

The Witness: From the conductor.

Juror No. 12: That is not this train list?

The Witness: That is a copy of the list.

Mr. Kiendl: It happens to be, but we will have to prove it, unless Mr. Hunt will concede it.

Mr. Hunt: No objection.

(Marked Defendant's Exhibit F.)

The Court: What do you call that?

Mr. Kiendl: Conductor's train list. That is the list of the cars in this train, without objection, the thirty-eight cars, showing the car numbers, the initial, the contents, the destination, the junction point, and subject to any corrections that Mr. Hunt may desire to make, I will make the statement that the train list and the seal record book correspond with the exception that the last number on one of [fol. 231] the Erie cars, on the conductor's train list, Defendant's Exhibit F, the number of the 33rd car on that list is 14141 CNJ, whereas on the seal record it is 14145 CNJ.

Q. Now, from that train list, Exhibit F, will you tell us what car it was that you first inspected, according to that record, Erie 76315? Where does that show?

A. That is the 25th car.

Q. The 25th car from the top of the list?

A. From the engine. That is according to this list.

Q. From the engine?

A. Yes, sir.

Q. And is that the 14th car or the 13th car from the rear end?

A. The 14th.

Q. And that is the car that heads your list in your seal record book?

A. Yes, sir.

Q. By the way, Mr. McGrath, if you discovered a broken seal you make a record of it?

A. Yes, sir.

Q. And what is the purpose of that,—to fix the responsibility as between the various carriers as to where the seal——

A. (Interrupting:) Yes; one railroad is responsible to the other, and it is for the claim department.

Q. If a foreign road delivers cars to your road and you examine them——

A. Yes, sir.

Q. You try to ascertain whether or not the seals are broken before you take delivery of them; is that it?

A. Yes, sir.

Q. And if the seals are broken and the contents damaged or pilfered, you have a record to show to the delivering carrier?

A. Yes, sir.

Q. That that seal was broken?

A. Yes, sir.

Q. And that they are responsible, and not your company, for the damages?

A. Yes, sir.

[fol. 232] Q. Or pilferage?

A. We make a police report.

Mr. Kiendl: That is all.

Cross-examination.

By Mr. Hunt:

Q. That is the theory as to why you keep a record. Now, you know, don't you, from your experience as a railroad man, that one of the most common remarks between railroads is that one claims a seal was on and another one claims that it was off at a given point? You know that from your experience, don't you? I am asking you.

A. Well, I can't say.

Q. Well, don't you know in the claims that railroads have against each other that is always the question, whether a

car door was open or sealed or was not sealed at a given point?

A. Well, they try to find out where.

Q. Well, you know that is the only question that is litigated between railroads, don't you?

A. Yes, sir.

Q. And there are hundreds and hundreds of situations of that kind are going on every day where one roads claims that a door was open and another claims it was closed and sealed, and you know that from your experience and from what you have heard?

A. Well, I am not in a position to say anything about it, because that is handled by the Claim Department.

Q. Yes. Now, your duties were what? What is your name, please?

A. McGrath.

Q. And your duties were what?

A. Billing clerk and car checker. Night clerk is the title of it.

Q. Night clerk. You were the night clerk at the Ashley yard, were you not?

A. Ashley station yard; yes, sir.

[fol. 233] Q. And yards—well, they are real railroad yards there?

A. I work at the office the biggest part of the night, at the station.

Q. Well, let me get briefly—the office was, I take it from what you say, some distance from the yards?

A. Yes, sir; it is about a fifteen minute walk.

Q. And when you walk from the office to the yards, towards the yards, you walk to the north or the south?

A. I am walking east and west.

Q. At that point you would be walking?

A. That is the direction I would be walking; yes.

Q. Well, at any rate, in the office, what did your office work consist of?

A. Way-billing cars.

Q. What does that mean?

A. Why, coal, way-billing coal.

Q. Is that all you way bill?

A. And taking care of inbound freight bills.

Q. Yes. What does that consist of?

A. Shipments that are billed to Ashley, Pennsylvania, different consignees.

Q. What other office work do you do?

A. Interchange with the Erie, take care of the interchange reports to and from the Erie.

Q. You take care of those; you are the clerical man in the office?

A. Yes, sir; in general.

Q. You don't do car inspection very much?

A. No. I take the seal record, I go around the train.

Q. You don't occasionally say to one of the inspectors, "Take a look at these seals for me" as you go around? You don't do that, do you?

A. I get the inspectors——

Q. Just answer me. Do you or do you not?

A. I do not tell him to get my seals for me, no, sir.

Q. I say do you occasionally ask one of the inspectors, if you are pretty busy that night with your clerical work, to [fol. 234] go around and——

A. (Interrupting:) No, sir.

Q. You don't do that?

A. No, sir.

Q. Do you ever get any help from one of the boys outside?

A. Yes; we have times when we call a man out extra.

Q. These are large yards, are they?

A. Well——

Q. How many trains?

A. There is one side has eight tracks.

Q. Yes.

A. Then there is a main track and several other tracks; there is about fifteen tracks there.

Q. Pretty good size yard?

A. Fairly good size; yes, sir.

Q. And a lot of trains in and out of there during the course of a day?

A. Well, this is what they call a branch. It is off the main line.

Q. I understand, but you have got the Erie Railroad coming in there in addition, haven't you?

A. Yes, sir.

Q. And during the course of a night you have a lot of,

I presume, yard work, and a number of trains in and out of there every night?

A. Oh, yes, sir; roustabout trains; yes, sir.

Q. And this Erie train came in?

A. Yes.

Q. What time did it get there?

A. 4:50 a. m.

Q. This train did not arrive at Ashley until 4:50?

A. That is the time I timed it when it clears the yard.

Q. What do you mean by that?

A. When his train stops on the track.

Q. Does this train pass by your office building?

A. No. When he gets his train clear of the other tracks, you see, he gets a track to come in on.

Q. Yes.

A. And when his hind end clears and his train stops, that is the time I get and I start checking.

[fol. 235] Q. Well, you have got to walk—how many——

A. I am down there waiting for him.

Q. How long, on this night, had you been waiting?

A. I was going down there about three o'clock. This train goes in service anywhere between one-thirty and two o'clock at Avoca.

Q. With all your office work to do you have been down there waiting an hour and fifty minutes?

A. Well, I have another train to prepare for him to take out.

Q. You have a train?

A. I have to go down and take these seal records.

Q. Yes.

A. To him, cars to him.

Q. Are you telling us what you did on this particular night?

A. No, I am telling you what I am doing every night.

Q. Yes. Well, is there any variation in your work at all?

A. What do you mean?

Q. Why, you would not go down there and wait an hour and fifty minutes?

A. Yes, sir; I go down as a rule around three a. m.

Q. Yes. Well, you prepare this train?

A. This train was going out to them; yes, sir.

Q. Going back on the Erie?

A. Yes, sir.

Q. And that took you how long to prepare that?

A. Well, I have a record there, if you will see over there, that shows what time I went down to the yard.

Q. Well, what time did you go down to the yard (handing book)?

Mr. Kiendl: May it be noted that the witness is examining the same book in which Defendant's Exhibit E is included?

Mr. Hunt: Yes.

[fol. 236] A. I started checking the train that he takes back at four a. m.

Q. At four o'clock?

A. Four a. m.

Q. Then you were not down there at three o'clock on this particular night?

A. Well, I don't know where I was.

Q. I just read from your own record. Something had happened this night so that you were away later than usual; is that right?

A. Yes.

Q. How big a train was that?

A. You see this train is not complete. There is twenty-one cars there that was on the track that I checked.

Q. How long did that take you?

A. I would say that would take me about fifteen or sixteen minutes.

Q. And you figure sixteen minutes—what did you say, fifteen or sixteen?

A. Yes; less than that, sometimes.

Q. What is that?

A. Less than that it would take me.

Q. Well, be as accurate as you can. What would you say, ten minutes?

A. Well, say ten minutes, yes.

Q. What do you have to do with those cars, the same thing as you do with these?

A. Take a seal record and put the bills in order for the conductor. You see, we are responsible to the other road, and we have to have things in order.

Q. So you did twenty-one cars in about ten minutes?

A. Yes.

Q. That would be pretty accurate, wouldn't it?

A. About ten; yes, sir.

Q. And you got through that job in ten minutes' time; that would be ten minutes after four?

A. In that proximity; yes, sir.

Q. Now, you have got forty minutes. Where did you go for those forty minutes?

[fol. 237] A. I don't know just what happened. I know what I do on certain occasions when I get time like that, I just sit down and take a rest.

Q. Well, take a rest; what do you think you did?

A. Took a rest in the car inspector's shanty.

Q. You did what?

A. Took a rest in the car inspector's shanty.

Q. And that shanty is where?

A. Why, it is located down in the yard, Ashley yard.

Q. Can you roughly draw that yard, putting your own tracks in, that refers to the Jersey Central, put in where your Jersey track comes in, and what was this last thing you mentioned, the car inspector's shanty?

A. Yes.

Q. Will you put that in too, and then put the direction in which your office was?

A. (Witness draws a sketch.) There is the east, here is the west.

Q. You have one track listed as the main track?

A. That is the main track; yes, sir.

Q. That is the main track of the Jersey Central?

A. It is the branch main.

Q. It is the branch main, yes, I understand.

A. That is the correct name of it.

Q. And where does the Erie track come in?

A. Why, that comes over here on the lines up here (indicating). We have another branch, what they call the Empire Branch, that comes down through Miners Mills this way.

Q. What I want to do is to point out to these gentlemen, if I can, how this Erie train comes into your yard; do you understand?

A. Yes. Well, it comes over the branch and then it crosses our main line.

Q. Yes?

A. Then it goes down into what we call the coal yard here (indicating).

[fol. 238] Q. Yes?

A. And there is only two tracks that he can come in, 3 and 4.

Q. Yes?

A. And as a rule I don't know which track he came in on, 3 or 4, and he picks up his train going out in what we call the freight yard, Track 4.

Q. You have made, and see if I am doing this so that we can save time, I will just extend this track across that——

A. What we call the main track.

Q. Do you see what I mean?

A. Yes.

Q. You don't know on this night whether he came in on Track 2 or 3?

A. Yes.

Q. Or possibly you say he might have come in on Track 4?

A. Yes, sir.

Q. Now I will put 4 there (marking); is that right?

A. Yes, sir.

Q. These other tracks I suppose join up down here (indicating)?

A. Yes, they all meet down there.

Q. And these tracks meet down here (indicating)?

A. Yes, sir.

Q. And so on. Now then, he went over to get his train out, he went over to what track?

A. He went over to Track 4. You see he pulls in on this and goes over to Track 4 (indicating).

Q. That is Track 4 which you marked, and I will put the word "outbound," that means the outbound train?

A. Yes, sir.

Q. And he came in on either 3 or 4, opposite where I write "in"?

A. Yes, sir.

Q. That is the in train?

A. Yes, sir.

Q. Now, your office was in what direction?

A. My office was up here in this direction (indicating).

Q. I will put an arrow pointing towards "Office".

A. Yes.

[fol. 239] Q. What is that other building you mentioned you went over and took a rest?

A. The car inspector's shanty.

Q. Where is that?

Q. 23922?
A. That is the number of the car.
Q. Then we have the letter "T" there.
A. That indicates a tank car.
Q. Then we have AJ 17521.
A. That is CNJ—Central Railroad of New Jersey.
Q. "B"?
A. Box.
Q. "UR"?
A. "URT".
Q. What is that?
A. Union Refrigerator Transfer; I think that is what it stands for.
Q. 26643; right?
A. Yes, sir.
Q. Erie B 90435?
A. Yes.
Q. Dash 36?
A. Yes, sir; that is the other seal on the other side.
[fol. 254] Q. Of the fourth car on your list, isn't it?
A. Yes, sir.
Q. On your list it is the fourth car, isn't it? Just answer yes or no?
A. Yes, sir.
Q. But of course it would not be the fourth car if, for some reason, you started back at the 14th or 28th or some other place; is that it?
A. It would not be the 4th.
Q. No, it would not be the 4th car on your list if you started back there, would it?
A. I usually start at the head of the page when we start checking, regardless of where we start in the train.
Q. And if you started where, possibly, the ordinary person would start, at the head end of your train, and worked back, it would be right there where we find it?
A. Yes, sir.
Q. The fourth car from the head, wouldn't it?
A. The fourth car there on the sheet; yes, sir.
Q. And the only reason that you say that you can find for claiming here in front of these gentlemen that instead of starting from the head end of your train and working down one side and up the other is because of this train slip that is in evidence; is that right?

A. Yes, sir.

Q. And there is nothing on that train slip; you did not make any notation on this train slip—in fact, there isn't any of your handwriting on that, please, from beginning to end, is there?

A. No, sir.

Q. But you say that by looking at that you are going to deduct that you—you are going to draw the conclusion that on this particular night, we will say, that although you were at the head end of the train, that on this particular night you went down and started at the 14th car because you have some empties on the rear end?

A. Yes, sir.

[fol. 255] Q. That is right?

A. For my convenience, yes, sir.

Q. For your convenience?

A. Yes, sir.

Q. What is so important—you had to walk over half a mile as it was. Suppose you had been up at the front end at that time,—now, you only had to start down one side and up the other; that is what your job amounted to, wasn't it?

A. No, there is lots more to it.

Q. But I mean on this particular job?

A. Yes.

Q. You have to go down one side and up the other; is that right?

A. Yes, sir.

Q. And you say for your convenience you walked down to the caboose and got that slip to see whether or not they had any empties on the tail end?

A. No, sir; those copies——

Q. Lets assume you were at the front end; what would you do?

A. Start at the front end.

Q. You would not care where the numbers were?

A. I would start any place as long as I got—I had my seal record; from the front end also.

Q. Start at either end?

A. Yes, sir.

Q. If it so happens you were at the front end this night——

Mr. Kiendl: What is that?

Q. I say if it so happens that he was at the front end this night when he came from the rest billets, if he happened to strike the front end of it, you would have started right there?

A. Yes, sir.

Q. And now you say that you went down to the rear end, down where the caboose was; is that where you got this from, somebody in the caboose?

A. Why, the caboose, when it comes in, they drop it down right onto Track 4 in the freight yard.

[fol. 256] Q. Yes.

A. This caboose rides down; I came out the shanty to get them and got on there.

Q. Did you get on this night?

A. I don't know in particular whether I did or not. As a rule I do.

Q. But you would not go looking around for the caboose if you happened to be at the head of Track 4 when it came in, would you?

A. No; start down one side the train and up the other. I would get the tickets and that list.

Q. And if you were near the head end you would start down one side and up the other?

A. Yes.

Q. And if you were near the rear end you would start up one side and down the other?

A. Yes.

Q. You never before in your life started at the 14th or 16th or 28th car unless you happened to come right up to it at that point?

A. Yes.

Mr. Kiendl: What is the answer?

The Witness: I start at any part of the train for my own convenience.

Redirect examination.

By Mr. Kiendl:

Q. And you have done that night after night while you have been seal inspector of the Central Railroad of New Jersey?

A. Yes, sir.

Q. You have inspected the Ashley freight, this Erie train?

A. Yes, sir.

Q. A great many years?

A. I have been working there since March 3rd or 4th, 1933, if I can recall.

Q. Right down to date?

A. Yes, sir.

Q. And sometimes you have started at the middle, sometimes at one end and sometimes another end, at any place that suited your convenience?

A. Yes, just so I had a record of the train.

[fol. 257] Q. And your job was to make a complete record of every car in that train?

A. Yes, sir.

Q. And on the night of July 27, 1934 you made that record and you have your original record here?

A. Yes, sir.

Q. Of every number?

A. Yes, sir.

Q. Every number of every seal, every car that you examined is shown in this record, is it?

A. Yes, sir.

Q. May I have it?

The Court: That record indicating Defendant's Exhibit E?

Mr. Kiendl: Yes, sir.

Q. You don't, Mr. McGrath, just guess the numbers of these seals and put down any numbers that come into your head, do you?

A. I take the actual record on the car.

Q. From the car door itself?

A. Yes, sir.

Q. And you take the actual initial and the actual number?

Mr. Hunt: Well, I object to leading.

Q. Do you take the actual number?

The Court: Overruled.

Q. Do you get the actual initial and actual number from each car itself?

A. Yes, sir; in order to protect the railroad company.

Mr. Kiendl: That is all.

(Witness excused.)

(Informal recess.)

Q. Now you see, until you have taken the same proportion of this page——

A. Yes.

Q. —that you have over here, that is down to that line (indicating)?

A. Yes.

Q. You see there isn't over one or two more notations at the most down as far as that, is there?

A. No, sir; but that is not the way the train stands.

[fol. 244] Q. I am only taking one at a time. Now, it does get a little heavier in this portion, doesn't it?

A. Yes.

Q. I mean it is a little heavier here to what it is in here (indicating)?

A. Yes, sir.

Q. So that the only difference, the only allowance that you want to fairly make is that you had a little more writing to do, therefore it would take you a minute or two more in proportion?

Mr. Kiendl: I object to that, if your Honor please. The question sounds to me to be absurd.

Mr. Hunt: Well, I can't help it, Mr. Kiendl.

Mr. Kiendl: All I can do is make the objection.

Mr. Hunt: I can't be responsible for your state of mind.

Q. Now, let's see if that is not the fact. The only difference you want to point out to these gentlemen, really, is that you had a little more writing to do?

Mr. Kiendl: Difference between what?

Mr. Hunt: Between the examination of these two trains. He knows what I mean, your witness knows.

Mr. Kiendl: Well, I would like to know. I am trying the case for the defendant.

Mr. Hunt: I assume you could follow me as well as the witness.

Mr. Kiendl: Well, I don't follow you.

Q. Is that the only distinction you wish to make?

[fol. 245] A. The time varies there. You see, you have to make a check of the train and the cars and find out whether they are loaded or empty.

Q. Well, start it over again.

A. I said that I took the twenty-one cars in ten minutes.

Q. When you got over to this train that had come in you did not slow up in your work, did you, for any reason?

A. No, sir.

Q. You had no reason for slowing down. As a matter of fact, you got through your work about what time?

A. I am through in the morning at nine a. m.

Q. And there is no occasion why you should slow yourself up and rest, was there?

A. I don't know; I don't remember anything.

Q. Well, at any rate, you know of no reason why you slowed up when you were going over this train?

A. Not anything in particular; no, sir.

Q. So that you went right along examining this Erie train, did you not?

A. Yes, sir.

Q. At about the same rate as you examined the train that was going out, except that you had to make a few more notations?

A. Yes, sir.

Mr. Hunt: Now maybe Mr. Kiendl understands it.

Mr. Kiendl: I think I have always understood the facts.

Q. Now, as a matter of fact, it took you, then, to examine these thirty-eight cars, and for fear of being checked I will make it accurate, your Honor,—in other words, had there been forty-two cars the time would have been, of course, twenty minutes; but there being thirty-eight cars, it would not take you quite that long except for this additional [fol. 246] writing which we ourselves can see on the book; is that right?

A. Yes, sir.

Q. So you know, do you not, by your own answer, that whatever time you spent on this incoming Erie train was not more than twenty minutes; that is true, is it not?

A. I would say about twenty minutes; yes, sir.

Q. And you know that in that twenty minutes you walked a distance, irrespective of anything else you did in that twenty minutes, you know you walked a distance of 3200 feet, do you, minimum?

A. Yes, sir.

Q. And you know how, you can recall when you were in school, you know how many feet there are in a mile, don't you?

A. Yes, sir.

Q. How many?
A. 1280.
Q. 1280 in a mile?
A. No.
Q. Well, you didn't go to Bucky Harris's school, did you?

Mr. Kiendl: Not in Hughestown, no.
The Witness: That is getting personal.

Q. No, I don't mean to be personal. Don't take it that way. No, I will correct you.

Mr. Kiendl: How many do you say, Mr. Hunt?
Mr. Hunt: I happen to know there are 5280 feet in a mile. Did you ask because you didn't know?
Mr. Kiendl: I wanted to find out for my information; I had forgotten.

Q. Well, you do know now you traveled, just mere walking, you walked about five-eighths of a mile, don't you?
A. Five-eighths of a mile?
[fol. 247] Q. Yes, to go around the train?
A. Yes, sir.
Q. Just in walking?
A. Yes, sir.
Q. And in addition, did you make this record as you went along?
A. Yes, sir.
Q. When you got over from this place where you had rested, have you the slightest recollection as to whether—when you first came around the Erie train were you near the head end of it or near the engine or down near the rear end?
A. I don't have any—I can't recall that.
Q. You can't recall that at all?
A. No, sir.
Q. Taking the position of the rest house, assuming you walked straight across and found the Erie train on Track 4 pulled clear in on Track 4, you would be where with respect to the engine?
A. Oh, I would be——
Q. (Interrupting.) Assuming you did just go in——
A. I would be in the clear here, near the leader, the main.
Q. You would be beyond the main?
A. Over on the main, yes, sir.

Q. Then you would have to walk back in order to get here?
A. Oh, no; I would be up here the end of Track 4.
Q. You would be up near the end of Track 4?
A. Yes, sir; in the coal yard.
Q. Beg pardon. In the coal yard?
A. As I explained.
Q. And that is the end that the engine was on?
A. No, sir. While he pulled in.
Q. Yes.
A. That is the end the caboose was on it where I started checking.
Q. I am not saying where you started checking yet. If you will follow me—if you had to go in and walk straight over, you would be up near the coal yard, wouldn't you?
[fol. 248] A. If the train would be stopping there, I mean as the train stopped, if I walked straight over, I would meet the train about in the center, approximately.
Q. I thought you said a minute ago that you walked straight over?
A. From the shanty, now.
Q. From the shanty, yes.
A. Yes, I was up near the main, I said, the branch main.
Q. You were up near the main?
A. The branch main; yes, sir.
Q. You were in the shanty, were you?
A. Oh, I guess I was. I was in there, and when I heard the Erie coming in——
Q. Don't you remember that less than two minutes ago I asked you if you had any idea up against what part of that Erie train you came when you got over there and——
A. (Interrupting.) I started on the fourteenth or fifteenth car to check this.

Mr. Hunt: May I refer back, your Honor, to refresh this witness's recollection, just a few questions back?

(Portion of the testimony referred to read by the stenographer.)

Q. Now, you heard the gentleman read that to you, didn't you?
A. Yes, sir.
Q. And you understood, when I asked you when you got over there did you come up near the engine or down near the

rear end and whether you had the slightest recollection, and you said you could not recall that. Was that true then?

A. No, that is not true. I went over and started on the 14th or 15th car.

Q. You told us a dozen times you started on the 14th car?

A. Yes, sir.

[fol. 249] Q. So do I understand by the 14th car that you just walked up against the side of the car or the train and started at whatever car you happened to be opposite; is that the way you did?

A. I got the bills on that train list——

Q. (Interrupting.) Please let me——

Mr. Kiendl: I submit, if your Honor please, Mr. Hunt wants to understand what this is about, and he asks the question, the witness begins to explain to him, and then he says, "Please" and stops him.

The Court: Let the witness answer the question.

Mr. Hunt: I will withdraw the question.

Mr. Kiendl: I ask the witness be permitted to answer.

Q. Now I ask you if you can answer this question yes or no, say so——

Mr. Kiendl: I submit that Mr. Hunt is not the man to tell the witness to answer yes or no. That happens to be the prerogative of this Court.

The Court: I can tell him.

Q. I ask you, if you can answer that yes or no, please do so, and if not, please say so.

The Court: Proceed.

Q. When you got up against the side of the train, no matter what number it is, the 14th or 28th or 1st car, do you start there or not?

A. I start whichever is convenient for me.

[fol. 250] Q. So on this night it was convenient to start on the 14th?

A. Yes, sir.

Q. This list that you have here, this Erie Railroad list of cars, that you have nothing to do with?

A. No, sir.

Q. That is something that is handed to you?

A. A copy of it; yes, sir.

Q. And that list is prepared by the Erie Railroad and turned over to your company?

A. Yes, sir.

Q. And comes into your possession?

A. Yes, sir.

Q. And it is against that list that you check?

A. Oh, no.

Q. You don't check against that list?

A. No, I just put that on file as a record; I don't bother with that at all; my actual record is in the book.

Q. But just a minute, then. At the time—When did you first see this list?

A. When the caboose—I see that—I mean the copy of it——

Q. Yes.

A. And the conductor is in the caboose, and I meet the conductor and hand him the bills that I have, and he hands me his bills, then I look at the list and see how the train is shaped up, then I start in checking.

Q. Then you look at this list?

A. Yes, sir, and see how it is shaped up.

Q. You see a paper with a lot of names on it like that?

A. Yes, sir.

Q. When you say you see how it is shaped up, what do you mean by that?

A. How the train is in order. I can tell whether they are loaded or empty through the contents of the car.

Q. Well, you have loaded cars and empty ones?

A. Yes.

Q. Or any other species, all the way down, do you not?

A. Yes, sir.

[fol. 251] Q. Wherever you find the blank cars, those are empties; is that right? A. That may be a ditto mark; is it not?

A. I don't know; I can't say.

Q. Now, sir, you spoke about seeing that list? How long do you spend looking at it?

A. Oh, just a minute, or so, I guess.

Q. Then you take that and put it in your pocket?

A. Yes, sir.

Q. And then what do you do?

A. Start checking the train, taking the——

Q. (Interrupting.) This list is never looked at again?

A. It is kept on file in case there is any dispute about my record.

Q. It is kept on file, but I mean so far as you are concerned in your work, you are through with it once you have looked at it a minute or two; is that correct?

A. Yes, sir.

Q. And does this list—one of the gentlemen asked you how you knew, how you were able at this time to come here and say that you started on the 14th car, and you said it was because of that list.

A. Yes, sir. Not that list. The copy of that list.

Q. Oh, yes, the same thing as this list?

A. Yes, sir.

Q. Because you could look at that and in some way determine that on this particular night you had started on the 14th car?

A. Yes, sir.

Q. Correct?

A. Yes, sir.

Q. And then you took a blank piece of paper and you went to work some way, didn't you?

A. I took a book.

Q. Yes; I mean you took a book?

A. No, I get bills. I write these interchanges. Is that what you mean, the interchange report?

Q. You have some paper with you besides this book when [fol. 252] you start your work?

A. That is the actual book.

Q. This book is what you have?

A. That is the actual book.

Q. And you walk alongside of the car, do you?

A. Yes, sir.

Q. And the first thing you write down is what?

A. The initial of the car.

Q. And you start at some car, and the first thing you put in the first column, you put in an initial, do you?

A. Yes, sir; initial of the railroad.

Q. Initial of the railroad?

A. That owns the car.

Q. Then you stand there and you put down two numbers, do you not?

A. I put down the number of the car.

Q. Well, why are there two numbers here, or is that all one number?

A. That is the entire number, 5—oh, that is the wrong—you want the date—you have a different date there. Here it is.

Q. Where you have two numbers, the same thing here, where you have two numbers——

A. Two numbers?

Q. First you put down "Erie TCX"; what is that?

A. Oh, that is another car. "TCX"; that is a tank car line.

Q. But they all looked to be in one line.

A. That is all in one block.

Q. There are two numbers in a block?

A. Yes, sir.

Q. One number which represents a car?

A. Yes.

Q. Now we have got it straight. Now then, your first—after writing down here "Erie," you then wrote down 76315?

A. Yes, sir.

Q. Then you wrote down, standing alongside of the car, "CASE 66088"?

[fol. 253] A. No, 67233. I did not write that down until I got around the other side of the train.

Q. But on that particular car that was written down some time. Then what else did you do while at that car?

A. See that the car is properly sealed, took the seal record and go to the next car.

Q. What do you mean by the seal record?

A. That seal that is there, Casco.

Q. What does that mean?

A. Casco Milling Company.

Q. What is that?

A. The Casco Milling Company.

Q. What does that mean, the type of seal, or what?

A. Yes, that is the owner's seal.

Q. The owner's seal?

A. Yes, sir.

Q. That means you found a seal on that car?

A. Yes, sir.

Q. Then you come down to TCX; what does that mean?

A. That is some tank car company. X is for company. I can't recall what individual company it is.

Q. Well, maybe Texaco?

A. Yes.

[fol. 258] GEORGE ADAMS, called as a witness on behalf of the defendant, being duly sworn, testified as follows:

Direct examination.

By Mr. Kiendl:

Q. Mr. Adams, you are the division car foreman of the railroad company, the Erie Railroad Company?

A. At Jersey City; yes, sir.

Q. And have been for how many years?

A. The last three years.

Q. And have you at my request made any examination to ascertain the extreme width of thirty-eight cars, the number and initials of which were furnished to you?

A. I have.

Q. Now, have you got such a thing as an official equipment register?

A. Yes, sir.

Q. And does that show the extreme width of various types of freight cars in various series of all the railroads of the United States?

A. Yes, sir.

Q. In the list of cars which I gave you or which were given to you by my associates, did you have each and every car in this train, Defendant's Exhibit F, beginning with car marked "1"; "MC 81706"?

A. Yes, sir.

Q. And ending with Car No. 38, "MCLX 3133"?

A. "MPLX 3133."

Q. Have you figured the width, the extreme overall width of each and every one of those thirty-eight cars?

A. All except the tank cars that we don't report.

Q. The tank cars you haven't any record in your official railway equipment register?

A. No, sir.

Q. But all the box cars you have those measurements?

A. Yes, sir.

[fol. 259] Q. Can you tell us, Mr. Adams, what was the extreme width of the narrowest car in those thirty-eight?

A. Nine feet ten inches.

Q. And what was the extreme width of the widest car in those thirty-eight?

A. Ten feet ten inches.

Q. Now can you give us the initials and numbers of the car that was ten feet ten inches wide at its most extreme point?

A. C&NW Car 35692.

Q. Is that the car that is marked No. 32 on Defendant's Exhibit F, CNW 35692?

A. Yes, sir.

Q. So that those cars, the thirty-eight cars, average between nine feet ten inches for the narrowest car to ten feet ten inches for the widest one?

A. Yes, sir.

Mr. Kiendl: Will you concede, Mr. Hunt, that the thirty-eight cars that he has on his list are the thirty-eight shown on Defendant's Exhibit F, without taking them one by one?

Mr. Hunt: Your associate had them checked?

Mr. Kiendl: Yes.

Mr. Hunt: Yes, I will concede.

Mr. Kiendl: It is so conceded.

Mr. Hunt: May I take the photographs that are in evidence?

Mr. Kiendl: Yes.

Cross-examination.

By Mr. Hunt:

Q. Will this official record you have, Mr. Adams, aid us in telling us the width between the—what is the standard gauge of the railroad?

A. I don't know that. That comes under a different department.

Q. Don't you know what the standard gauge railroad is?

[fol. 260] Mr. Kiendl: Maybe we can agree on that.

Mr. Hunt: What is it, do you know?

Mr. Kiendl: Yes; it is 4.71.

Mr. Hunt: And is that from the outside of the rail to the inside?

Mr. Kiendl: That is from the inside of the rail to the inside of the rail.

Mr. Hunt: And the rails themselves are what?

Mr. Kiendl: About two and one-quarter inches to three inches on the tops. The widest rail is three inches on top.

Mr. Hunt: Three inches?

Mr. Kiendl: That is the widest.

Mr. Hunt: Three inches and three inches would be six inches. And what is the other?

Mr. Kiendl: 4.71 feet. That would make 5.31.

Mr. Hunt: That would be five feet; and what is that, three inches?

Mr. Kiendl: A little less than that, approximately.

Mr. Hunt: A little less than three inches. Five feet and a little less than three inches.

Q. And then do you happen to know the—can you see those ties there, Mr. Adams?

A. Yes.

Q. Outside of the rail?

A. Yes.

Q. Of course the bottom of your rail is wider than the top, isn't it?

A. Yes, sir.

Q. What is that distance, that usual distance?

Mr. Kiendl: The width of the ties?

Mr. Hunt: Outside of the bottom part of the rail; how much is that? Do you have it, Mr. Kiendl?

[fol. 261] Mr. Kiendl: The ties are eight foot ties.

Mr. Hunt: So the——

Mr. Kiendl: Is that conceded, Mr. Hunt?

Mr. Hunt: If you say so; if you know that is the fact; and I assume you do.

Mr. Kiendl: I say so.

Mr. Hunt: So that the center line of the tie, from the center line to either side of course is four feet?

Mr. Kiendl: That is conceded and stipulated.

Q. Now, then, what was the widest car you got?

A. Ten feet ten inches.

Q. So that drawing a straight line through the center of that car to the outside would be five feet five inches?

A. Right.

Q. So that on that particular type of car, if those measurements are accurate, there would be an overhang—do we agree, Mr. Kiendl,—an overhang of one foot and five inches beyond the end of the ties? Am I right or wrong?

Mr. Kiendl: Oh, you are perfectly right. We not only agree upon it, but I have proven that fact.

Mr. Hunt: What?

Mr. Kiendl: I have proven that fact, the overhang of one foot five inches on either side of the car ten feet ten inches wide.

Mr. Hunt: If that is the widest car you have mentioned.

Mr. Kiendl: That is correct.

Q. And how many of those are there on that train?

A. There is only one of them.

[fol. 262] Q. What is that?

A. There is only the one car of that width.

Q. Now, there is only one car at that width?

A. Yes, sir.

Q. And you gave us the number of that car as what?

A. C&NW 35692.

Mr. Hunt: Your Honor will have to indulge me here. I am not familiar with this.

Q. And is that, according to your way of figuring, the 21st car on the train?

Mr. Kiendl: No, it is, according to our way of figuring, the 32nd car from the engine.

Mr. Hunt: That would be a way back to the rear end of the train?

Mr. Kiendl: Yes. Are you accepting my statement of it?

Mr. Hunt: No, I am asking you.

Q. You understood now Mr. Kiendl said according to your way of figuring—will you kindly help us and save time, and tell me where that car would be on the train?

A. Yes, sir.

Q. The 32nd car?

Mr. Kiendl: The 32nd car from the engine.

Q. And you know in this case the blood was found on the fourth or fifth car, do you not?

Mr. Kiendl: I object to anything about that. This witness knows nothing about that.

[fol. 263] Q. Haven't you been told about it?

A. Well, I have been told, but——

Mr. Kiendl: I object to what he has been told.

The Court: Objection sustained. Strike it out. The jury will disregard it.

Q. Were you given the dimensions of the engine in this case?

A. No, I was not.

Q. Were you given the number of the engine?

Mr. Kiendl: Mr. Hunt, if I may interrupt, and simply to save time, we have a man here who will testify to the over-all dimensions of the engine.

Mr. Hunt: That is all I want, sir.

Mr. Kiendl: I thought maybe I could save you time. That is all, thank you, Mr. Adams. Now, Mr. Whitney, will you take the stand? And this is a man who will testify to the engine.

LEONARD WHITNEY, called as a witness on behalf of the defendant, being duly sworn, testified as follows:

Direct examination.

By Mr. Kiendl:

Q. Mr. Whitney, you are an engine inspector in the employ of the defendant, Erie Railroad Company, are you not?

A. Yes, sir.

Q. Are you familiar with the type of engine, Erie engines No. 2400?

A. Yes, sir.

Q. And particularly Engine No. 2499?

A. Generally familiar with that type of engine; yes, sir.

[fol. 264] Q. What type is that called in relation to number?

A. J-2.

Q. That is called the J-2 engines?

A. Yes, sir.

Q. And you have seen and inspected and know all about J-2 engines, I suppose?

A. Yes, sir.

Q. Have you ascertained for me the over-all width of the J-2 engine of the class we are talking about of which 2499 is one, the extreme width?

A. Yes, sir.

Q. What is it?

A. Ten feet three inches.

Q. That is 123 inches?

A. Yes, sir.

Q. And where is that at, the cylinder heads?
A. At the cylinders.
Q. And where are the cylinders?
A. On each side of the engine, at the front end.
Q. And you say it is ten feet three inches?
A. Yes, sir.

Mr. Kiendl: That is all.

Cross examination.

By Mr. Hunt:

Q. Ten feet three inches?
A. Yes, sir.
Q. Is that from the outside cylinder to the outside cylinder?
A. Yes, sir.
Mr. Hunt: That is all.

Watson B. Bunnell, called as a witness on behalf of the defendant, being duly sworn, testified as follows:

Direct examination.

By Mr. Kiendl:

Q. Mr. Bunnell, you are a photographer by occupation?
A. Yes, sir.
[fol. 265] Q. You live in Scranton, Pennsylvania?
A. Yes, sir.
Q. You are in the employ of the Erie Railroad Company?
A. Not generally, only as a free lance photographer.
Q. Do they employ you from time to time to take pictures?
A. They do.
Q. And you have done that?
A. Yes, sir.
Q. Did you take pictures of the territory in the vicinity of Rock Street and the railroad tracks there?
A. I have.
Q. At the request of the Erie Railroad Company?
A. Yes, sir.
Q. I show you certain pictures marked Defendant's Ex-

hibit D and ask you if you can tell us whether or not you took those pictures on the fifth day of April, 1933?

A. I did.

Q. Now I show you the defendant's exhibit, six pictures containing Defendant's Exhibit C, and ask you if you took those pictures on the 18th day of April, 1935?

A. I did.

Q. Now I show you, Mr. Bunnell, two pictures marked Plaintiff's Exhibits 2 and 3. Did you take those two pictures?

A. I did.

Q. Can you tell us what date you took those?

A. September 5, 1934.

Q. I show you two more pictures marked Defendant's Exhibits A and B, and ask you if you can tell us when you took those pictures?

A. Those were taken April 5, 1933.

Q. At the same time did you take Defendant's Exhibit D?

A. Yes, sir.

Q. Now, Mr. Bunnell, all these photographs that you took were taken at the request of the railroad company, you told us?

A. Yes, sir.

[fol. 266] Q. Do they represent the conditions which they purport to represent photographically?

A. They do.

Q. Showing pictures taken from the south side of Rock Street across the crossing?

A. Yes, sir.

Q. And pictures taken from the other side across Rock Street to the south?

A. Yes, sir.

Q. Showing the ditch that has been spoken about here?

A. They do.

Q. The territory between the fence and the first rail of the track between Rock Street and Hughes Street?

A. Yes, sir.

Mr. Kiendl: Your witness.

Cross-examination.

By Mr. Hunt:

Q. Mr. Bunnell, they show the conditions photographically you said?

A. Yes, sir.

Q. You mean by that, what?

A. The general appearance of the ground as you would see it at that particular point.

Q. Just as an illustration I want to—here is one of your pictures; that is looking to the north along the railroad, do you say?

A. Yes, sir.

Q. And you can see this bank that lies here between Rock Street and Hughes Street; this bank in here?

A. Yes, sir.

Q. Can you see that?

A. Yes, sir.

Q. Well now, this is not by way of criticism at all, but that bank from your picture looks smooth, and very smooth indeed, doesn't it?

A. Looking across the ditch, which only shows the upper portion of it.

Q. It looks smooth?

A. It looks like it did that day.

[fol. 267] Q. It looks like a roadbed that has been recently constructed and smoothed off?

A. No, I would not say that.

Q. Well, the point is that the reason—that doesn't show that bank the way it was, in any respect whatsoever, due to the angle at which your camera was focused; it is looking down the slope, and when you look across, if you take some ruts and put in the street here, and if you get your camera back and take a view across those ruts, it just fore-shortens it, therefore it looks smooth—that is a photographic expression, isn't it?

A. To a certain extent, to the naked eye, too.

Q. Yes. And here is another picture, looking at another of your pictures, Exhibit 3, as you look down towards the corner here, why, it looks relatively smooth, doesn't it, due to the angle at which your camera is furnished for that particular picture?

A. What you would see from the naked eye from this point.

Q. From the particular point your camera was stationed at?

A. Yes, sir.

Q. Now then, when you want to show, and I am only asking you this, in other words, in a camera such as you

have, you have to be very careful to consider the angle at which it is stationed, do you not?

A. Well, it is what you see from the point it is taken.

Q. Well, I show you this picture. Now you see when you get right down here to this bank now we have got more of an idea of exactly what it looks like?

A. Yes, sir.

Q. You can see your different grades, the grade varies all along, doesn't it?

A. Yes, sir.

Q. You can see this particular part that is almost a ditch in there, isn't it?

A. There is a break there; yes, sir.

[fol. 268] Q. And a bad break, isn't it?

A. A large break.

Mr. Kiendl: Do you mean up against the fence, Mr. Hunt?

Mr. Hunt: No, just where I am pointing to right here.

Mr. Kiendl: Let me see it.

Mr. Hunt: Right along there (indicating).

Mr. Kiendl: I see.

Q. And then it shows the difference in contours as you go along through there?

A. Yes, sir.

Q. That is the nearest to an accurate view that we have got from your picture?

A. I would not say that; they are all accurate views.

Q. Accurate views considering where the camera is located?

A. Yes. That is a better view of this particular spot.

Q. Yes; that is what I mean, of this particular place.

A. Yes.

Mr. Hunt: That is all.

Redirect examination.

By Mr. Kiendl:

Q. And you took the pictures from various spots?

A. Yes, sir.

Q. Looking north, looking south, looking east and looking west?

A. Yes, sir.

Q. And you have here a total of sixteen different photographs, have you not?

A. Yes, sir.

Q. Now I show you Plaintiff's Exhibit 5, taken by some other camera and some other photographer. Does that show substantially the same condition between the track and the fence that is shown in your photograph?

[fol. 269] A. It does, with the exception that the Kodak picture is always taken low.

Q. That is always taken low. That shows the surface of the ground in the space I am now describing to you?

A. Yes, sir.

Mr. Kiendl: That is all.

ALFRED ALWORTH, called as a witness on behalf of the defendant, being duly sworn, testified as follows:

Direct examination.

By Mr. Kiendl:

Q. Mr. Alworth, what is your occupation?

A. Car inspector.

Q. What company?

A. Central Railroad.

Q. And how long have you been employed by the Central Railroad Company of New Jersey?

A. About 25 years.

Q. And always in the capacity of a car inspector?

A. Yes, sir.

Q. And how much of those 25 years did you spend as car inspector at Ashley, Pennsylvania?

A. Well, that is where the work is.

Q. All the time?

A. Yes, sir.

Q. And you were working there, were you, on the night of July 27, 1934?

A. Yes, sir.

Q. Working there that whole month?

A. Yes, sir.

Q. Did you know about the Erie train coming in there that night, the Ashley Special?

A. Yes, sir.

Q. That train came in almost every night, didn't it?

A. Yes, sir.

[fol. 270] Q. Sometime late in the morning?

A. Always after midnight.

Q. Were there any other Erie trains that came in there during the night from Avoca?

A. No, sir.

Q. That was the only one?

A. Yes, sir.

Q. On your shift?

A. Yes, sir.

Q. You are sure of that?

A. The only one on my shift; yes, sir.

Q. When did you go on duty?

A. At eleven o'clock at night.

Q. So from eleven o'clock—when did you go off duty?

A. Seven o'clock in the morning.

Q. From eleven to seven there was only one Erie train that would come in there while you were working?

A. Yes, sir.

Q. In 1934?

A. Yes, sir.

Q. Now as a car inspector your duties consisted of inspecting cars, didn't they?

A. Yes, sir.

Q. And how did you do the work, generally? I don't mean in connection with this particular train, but when you had a train of cars to inspect, did you do it alone or did you work in teams, or how did you do it?

A. Worked in teams. I have a buddy that works with me.

Q. Who was working with you, do you recall, on the night of July 27, 1934?

A. Steve Prabola.

Q. He is dead now, is he?

A. Yes, sir.

Q. And were you stationed at the car inspector's shanty that some witness talked about here?

A. That is where we keep all the material and our tools, yes, sir.

Q. Now, when you inspect cars coming in there do you keep records for your company?

A. Yes, sir.

Q. You keep a record of the inspection that you make of cars?

A. Yes, sir.

[fol. 271] Q. At Ashley?

A. Yes, sir.

Q. And you did keep and maintain such a record in the regular course of your duties and performance of your duties?

A. Yes, sir.

Q. As a car inspector?

A. Yes, sir.

Q. You have never been employed by or paid by the Erie Railroad Company in any way, have you?

A. No, sir.

Q. Now, tell us generally as a car inspector what inspection do you make of these cars or trains coming into the yard there at Ashley?

A. We inspect them for all safety appliances and see that the car is in fit and safe condition to move.

Q. On the night of July 27, 1934, after midnight, did you and your teammate, Prabola, inspect the Ashley Special that came into the Ashley yard from the Erie Railroad?

A. Yes, sir.

Q. And did you maintain and keep a record of that inspection?

A. Yes, sir.

Q. And is this it (handing)?

A. Yes, sir.

Q. This book that I show you is your car inspector's book of inspections, is it not?

A. Yes, sir.

Q. And it contains a record of the inspection on July 27, 1934?

A. Yes, sir.

Q. Of this Ashley Special?

A. Yes, sir.

Q. And is the handwriting, pencil writing on the pages of that book for that train your handwriting?

A. No, sir.

Q. Whose handwriting is it in?

A. Prabola's, my buddy.

Q. Prabola, your buddy, who is now dead?

A. Yes, sir.

Q. As you go along do you swing your lantern under the train as you go along it?

A. Yes, sir.

Q. And you have to look after your cotter pins—those cotter pins are mentioned in the Safety Appliance Act?

A. Yes, sir.

Q. And you have to look at your couplings in there to see that they are all right?

A. Yes, sir.

Q. And you have got to look at your steps, if it is a box car?

A. Yes, sir.

Q. Those are all mentioned in the Safety Appliance Act?

A. Yes, sir.

Q. And those are at the end of the car?

A. Yes, sir.

[fol. 279] Q. Those steps and grab irons are at either end of the car?

A. Yes, sir.

Q. So after you get one end inspected, then you come down around the trucks?

A. Yes, sir.

Q. Go along there?

A. Yes, sir.

Q. And then you go over to the other end and do the same thing at the other end?

A. Yes, sir.

Q. How long does it take you to go down along forty cars, we will say; about how long would it take you to go down along forty cars?

A. That depends. Sometimes it will take an hour and a half, an hour and three-quarters.

Q. Well, you are assuming that you possibly found some trouble. Let's assume that you went down a side of a train where there was no trouble and you move right along; it would take you about how long to go down one side of the train of forty cars where you find everything all right?

A. Oh, half an hour or three-quarters.

Q. By the way, where were you when this train came in?

A. I was at the inspector's shanty.

Q. Well, is that your rest place that the last one of the witnesses was talking about?

A. Yes, sir.

Q. You were over in the rest place?

A. Yes, sir.

Q. How long had you been over in the rest place?

A. Oh, I don't know how long I was over there.

Q. Well, an hour or two hours?

A. I could not say that; I could not swear how long I was there.

Q. Who else was in the rest place besides you and——

A. Well, this car checker came there and this partner of mine that is dead now.

Q. Anybody else?

A. Not that I recollect.

Q. Well now, what happened was this—when were you first asked by anybody about this particular inspection that you made on this particular night; how long after the acci- [fol. 280] dent before anybody from the railroad came around to ask you about it?

A. Oh, that I was notified about it, do you mean?

Q. No, no; somebody from the claim department, some investigator or somebody came up to ask you about this.

A. We were subpoenaed to go to Pittston.

Q. Was that the first time you had ever been asked about this particular inspection?

A. No, I don't think it was.

Q. Well then, tell me; take your time, don't hurry,—about how long after this accident before anybody came around to ask you about the inspection that you made on this particular night?

A. I could not tell you how long after it was.

Q. Well, was it a month or two months?

A. I don't remember for sure.

Q. Haven't any idea?

A. I haven't any idea. I was going home from work one morning.

Q. When somebody came up and asked you about it?

A. Yes, sir.

Q. And, of course, if I were to ask you about any inspection that you made on a particular night, you would have to say, "I can't tell you anything until I get the book." That would be the fact, would it not?

A. Yes.

Q. So after you had been asked you went and saw the book sometime, did you?

A. Yes, sir.

Q. So all your testimony here, whatever you said about the work you did and so on, all depends entirely upon what you found here in this book; is that correct?

A. Yes, sir.

Q. You assumed that your buddy, as Mr. Kiendl called him, did his work right and made the notations?

[fol. 281] Mr. Kiendl: Not as I called him; as he called him.

Mr. Hunt: Well, that is all right; no criticism, Mr. Kiendl.

Mr. Kiendl: No, I know that, Mr. Hunt, but let's keep the record straight.

Q. You assumed that he did his work right, and from this book you gave this testimony that you have given here in court; is that correct?

A. Yes, sir.

Q. Now then, is there anything in that book—I will withdraw that question. The first thing Mr. Kiendl asked you about was whether you started at the rear end of this train; did you?

A. Yes, sir.

Q. And your memory is no better now, is it, than the time that you testified down in Scranton? Nothing has happened in the meantime to make your memory any better today than it was down there?

A. I don't think so.

Q. Your name is Alfred Alworth, is it?

A. Yes, sir.

Q. Well, you testified under oath before the Commissioner, or whatever they call him down there, did you?

A. Yes, sir.

Q. And were you asked this question, page 4:

"Q. Did you examine that train starting from the engine, or did you start from the end of the train?

"A. I don't recollect which way I started from that morning"?

Did you answer that?

A. I don't remember, but if it is in that——

Q. Well, I will show it to you. It will be conceded that you so testified, I take it.

[fol. 282] Mr. Hunt: It is conceded, is it not, Mr. Kiendl?

Mr. Kiendl: The first question and answer on the record of his deposition is exactly the way you read it.

Q. "Q. Did you examine that train starting from the engine or did you start from the end of the train?

"A. I don't recollect which way I started from that morning."

Do you remember answering that?

A. No, I don't now.

Q. Well, if you testified then, you were telling the truth then, weren't you?

The Court: Now, Mr. Hunt, isn't it a matter of concession by Mr. Kiendl that that is the question and that is the answer?

Mr. Hunt: Exactly, your Honor. Now I want to ask my next question.

Q. Has anything transpired since you so testified that makes your memory any better at the present time?

A. No, sir.

Q. So your memory is no better at the present time?

The Court: He has already testified to that.

Mr. Hunt: All right.

Q. Now, sir, Mr. Witness, you either started at one end or the other, didn't you?

A. Yes, sir.

Q. All railroad men who go over a train, just as a matter of habit if not custom, start at one end or the other, don't they?

A. Yes, sir.

Q. And that has been your observation, for any kind [fol. 283] of an inspection they start at one end or another?

A. Yes, sir.

Q. Every railroad man you ever saw going along taking numbers of the cars, the common sense of it is he either starts at one end or the other, doesn't he?

A. Yes, sir.

Q. He doesn't go up and start at any 14th car, does he? Just tell me the truth about that?

A. Well, in my line of work I could not do that.

Q. I am talking about your general observation as a railroad man; you never remember a man who is going

Q. Now, this record and this car inspection book record consists of about two and one-half pages, does it not?

A. Yes, sir.

[fol. 272] Q. For this particular train?

A. Yes, sir.

Q. And it shows, does it not, the car numbers, the car initials, the condition of each car in the train?

A. Yes, sir.

Q. There are thirty-eight cars on that list, as I have just counted them; if you will take my count.

Mr. Kiendl: Mr. Hunt, do you accept that?

Mr. Hunt: All right.

Mr. Kiendl: And will you stipulate also, to save time, that the car initials and numbers of each one of those thirty-eight cars correspond with the car initials and numbers on the train list, Defendant's Exhibit F?

Mr. Hunt: If you have checked them.

Mr. Kiendl: I have checked them.

Mr. Hunt: All right, sir.

Q. Now will you tell us how you and your buddy, Mr. Prabola, inspected these thirty-eight cars? What did you actually do?

A. Well, we put our blue lights on the rear end of the Erie train, that is the caboose end, and as we go along he takes the number of the car, or he took it, rather, and when we got between them we hollered to one another "O. K." and he marks down "SAOK".

Q. So you start from the caboose end, do you?

A. Yes, sir.

Mr. Hunt: Just a moment.

Mr. Kiendl: I will try and clear it up.

Mr. Hunt: I object to any leading on where he started.

Mr. Kiendl: Well, he said he started at the caboose end.

[fol. 273) The Court: Overruled.

Q. You just told us you started at the caboose end.

Mr. Hunt: No, he said he put some lights on the caboose end.

The Court: He said also that he started at the caboose end.

Q. And the first car that you come to that you inspect would be the first car put down in the book?

A. Yes, sir.

Q. What was the first car in that train, according to the book, in the handwriting of your deceased buddy, 31——

A. 3133, MPLX.

Q. And that would be the car next to the caboose?

A. Yes, sir.

Q. And then the cars would be listed as they appear in the train coming up to the engine?

A. Yes, sir.

Q. Is that right?

A. Yes, sir.

Q. Now take the first car, which was MPLX 3133.

A. Yes, sir.

Q. You started to inspect that?

A. Yes, sir.

Q. Did you inspect this particular car and these particular cars on that particular night?

A. Yes, sir.

Q. You don't remember the numbers of any cars or their location in the train?

A. No, sir.

Q. Or the type of cars or anything of that kind, do you?

A. No, sir.

Q. But when you would inspect the first car beginning at the rear end, 3133, you would be on one side of the car?

A. Yes, sir.

Q. And where would your buddy be?

A. On the opposite side.

[fol. 274) Q. And what would you do; would you walk around the car or alongside the car, or just what would you do?

A. We would walk alongside of the car.

Q. You would walk on one side and your buddy on the other?

A. My buddy on the other; yes, sir.

Q. And would you continue that process as you inspect each car until you got right up to the head end?

A. Yes, sir.

Q. And you said when you got in, you would yell across "O. K.," or something of that sort?

A. Yes, sir.

Q. By that do you mean that when you had come to the end of the car——

A. The end of each car.

Q. The end of each car, where there is an opening where the couplers and drawheads are?

A. Yes, sir.

Q. Then you would proceed to the next car and do the same thing?

A. Yes, sir.

Q. And you did that for each and every one of the thirty-eight cars in this particular train?

A. Yes, sir.

Mr. Kiendl: Now I offer the record consisting of three pages just described in evidence.

Mr. Hunt: No objection.

(Marked Defendant's Exhibit G.)

Q. In this record Defendant's Exhibit G you have got various notations that I want you to explain to the Court and Jury. For instance, against Car 3133, the car we were just talking about, you have——

A. T.

Q. TE——

A. P.

[fol. 275] Q. What does that mean, "TEP"?

A. Tank empty.

Q. And then you have "DC" and "OCOK".

A. That means dump cap and outlet cap O. K.

Q. And then you have over here right under the heading of condition "SAOK."

A. That means safety appliance O. K.

Q. Now, against various other of these cars you have the initials "BE." Does that mean box car empty?

A. Yes, sir.

Q. And "GONE." Does that mean gondola empty?

A. Yes, sir.

Q. And under Car 14145 you have "Cotter in brake pin."

A. Yes, sir.

Q. "A"?

A. Yes, sir.

Q. What does that mean?

A. Cotter in brake pin, A; that means that we came to that car and saw a cotter missing out of it.

Q. And what is a cotter?

A. A cotter pin; a brake cotter pin that is put in to hold the brake pin in from coming out.

Q. You put in a new cotter pin; is that what that means, in that car?

A. Yes, sir.

Q. Now against Car 4011 you have "Ref L." Does that mean refrigerator loaded?

A. Yes, sir.

Q. Now against Car 2664, URT, you have the same notation, refrigerator loaded?

A. Yes, sir.

Q. "REF L."

A. Yes, sir.

Q. And then against Car 85412 you have refrigerator loaded?

A. Yes, sir.

Q. And were there any refrigerator cars in that train other than the three I have just called your attention to?

A. No, unless they are in the book.

Q. Well, there are no more in the book, are there?

A. No, sir; I don't see any there.

Q. And where the words "Prabola and Alworth" are [fol. 276] written on the third page, is that the end of the inspection of the Ashley Special or the beginning of your next inspection?

A. That is the beginning of the next day on, the other side is.

Q. Where do the book entries end of the inspection of the Ashley Special, above this Prabola?

A. Above the name; yes, sir.

Mr. Kiendl: Now I will put a line across there, if I may.

The Court: Certainly.

Mr. Kiendl: I will put a slightly wavy line across there to indicate that that is the end of the Ashley Special.

Q. Against 21639 you have a notation in Prabola's handwriting?

A. Yes, sir.

Q. "1 sh." That is one secondhand, is it?

A. Yes, sir.

Q. "Bk"; that is brake?

A. Yes, sir.

Q. Shoe?

A. Yes, sir.

Q. "R 2."

A. Yes, sir.

Q. What does that mean?

A. That means that he put a secondhand brakeshoe on the R-2 brake beam of that car, the central box car.

Q. 21639?

A. Yes, sir.

Q. Now, with the exception of the insertion of the cotter pin and the putting on of the secondhand brakeshoe, did you make any repairs or did Prabola make any repairs to any of the cars in that train?

A. No, sir.

Q. Were there any defective conditions that you discovered when you went along your side of these thirty-eight cars?

A. No, sir.

Q. Were there any defective conditions that Prabola discovered when he went along his side of the cars that he told you about?

A. No, sir.

[fol. 277] Q. How long had Prabola been working with you?

A. About four or five years, I judge.

Q. And what are the purposes of these inspections that you and your teammate or buddy make of incoming trains from other railroads; do you know? For ascertaining defects, you say, to see that they are in proper running order. Do you know what the purpose of that is?

A. To see that they are safe when we accept them from the Erie Railroad.

Q. And if they are defective, what do you do after that, when you inspect them?

A. I shop them.

Q. Shop them?

A. Put shop tickets on them.

Q. And when those cars, if they come in in defective condition and are shopped, are those defects charged against your railroad or Central Railroad of New Jersey or against the delivering carrier, the Erie Railroad Company in this case?

A. Against the Erie.

Mr. Kiendl: You may examine.

Cross-examination.

By Mr. Hunt:

Q. Mr. Alworth, you knew about this accident for the first time when?

A. Oh, the next day, I think it was.

Q. After your work was over at seven o'clock you went home, I take it?

A. Yes, sir.

Q. So you didn't know anything about an accident until when you got back to work the following night?

A. Yes, sir.

Q. That is the first you knew of any accident?

A. Yes, sir.

Q. And by that time these cars had already gone or been shipped on their way, had they?

A. Yes, sir.

[fol. 278] Q. So that at that time when you were making your inspection you were not making any inspection because an accident had happened; you were doing your routine work?

A. Yes, sir.

Q. And you had—let's see, in the nighttime you have a lantern, don't you?

A. Yes, sir.

Q. You are familiar with the requirements of the so-called Safety Appliance Act?

A. Yes, sir.

Q. And you know all the different parts of a car that are mentioned in that Act that you must look at?

A. Yes, sir.

Q. There is nothing about any door?

A. Nothing about any door in the Safety Appliance Act?

Q. Is there?

A. Yes, sir; there is, or I presume there is; yes.

Q. In the Safety Appliance Act about a door?

A. Well, if it extends out in any way at all, yes, or would hit anything at all.

Q. I guess you didn't understand me at all. You know I am talking about grab irons and steps and those things. You always make an examination of those, don't you?

A. Yes, sir.

Q. Do you have a lantern?

A. Yes, sir.

train. With relation to cars numbered 81706, 109569, 7123, 92607, 11170, do you recall whether you discovered any defects in those cars that evening?

"A. I don't recall.

"Q. Does Exhibit A indicate whether there were any defects in those five cars?

"A. No, sir.

"Q. Do you recall how long it took to inspect this freight train on the morning of July 27, 1934?

"A. No, sir.

"Q. Approximately how long in your opinion would it take to inspect a freight train containing 35 cars with a crew of two men?"

An objection to that question and it was not answered.

"Q. How long have you been working for the Central Railroad of New Jersey?

"A. Thirteen years.

"Q. How long have you been a car inspector?

"A. Thirteen years.

"Q. Approximately how long in your opinion would it take to inspect a freight train containing 35 cars with a crew of two men?

"A. That is something I don't know.

"Q. Approximately how long for this type of train?

"A. It is according to what kind of weather it is.

"Q. Do you recall the weather conditions on July 27th?

"A. I do not recall.

"Q. How long in your opinion would it take to inspect [fol. 294] a train containing 35 freight cars on an early morning in July which was clear?

"A. I don't know.

"Q. Well, would it take about five hours?

"A. It wouldn't take five hours. It would take at least two hours.

"Q. Well, a train of this type with 37 cars?"

There was an objection to that question and it was not answered.

"Q. How long would it take to inspect a 35 car train of the character of the train in question with a crew of two men on a clear morning in July, notwithstanding only

several cotter pin repairs and several brake shoe repairs, in your opinion?

"A. About two hours.

"Q. That is all."

I will now read the cross-examination by Mr. Hyde, of counsel for the Railroad Company in this case:

"Q. Mr. Probola, you are not in any way connected with the Erie Railroad?

"A. No.

"Q. You say you inspected this train on the morning of July 27th, 1934?

"A. Yes, sir.

"Q. And you found no defects in any of the cars of this train except the cotter pin and brake shoe which you enumerated in your direct examination?

"A. Yes.

"Q. Did you test the grab-irons on this train?

"A. Yes.

"Q. How did you test them?

"A. With my hand to see if it is loose.

"Q. The two defects which you testified to, how would [fol. 295] you classify those defects, are they minor defects?

"A. They are only minor defects.

"Q. Could they in any way project to protrude from the side of the cars, the defective cotter key or the other?

"A. No.

"Q. Each train that comes into the Ashley yard is made up of this type of car, isn't it?

"A. Yes.

"Q. Do you recall any instance of two trains consisting of the same number of cars or types of cars?

"A. No, sir.

"Q. And your time of inspection necessarily depends upon the type of car, the number of cars in the train and the time that it takes to make any necessary repairs, if any, is that not correct?

"A. Yes, sir.

"Q. And you don't recall how long it took you and Mr. Alworth to inspect this particular train, do you?

"A. I do not."

Mr. Hyde said that is all, and then the witness was examined on redirect examination by Mr. Nemeroff, the attorney of record for the plaintiff:

"Q. Do you remember in particular the train of the Erie that came in on the morning of July 27th at about 4:40 A. M.?

"A. Yes.

"Q. You remember that train?

"A. Yes.

"Q. Could you tell me without looking at the book what that train consisted of, how many cars and exactly how many cars of each type in that train?

"A. Not that way. I remember the train coming in the yard.

"Q. Do you remember how long it took to inspect that particular train?

"A. No.

[fol. 296] "Q. Do you recollect whether you inspected the train starting from the engine or the end of the train?

"A. I don't remember.

"Q. You know that a train came in and you don't remember anything except what the Plaintiff's Exhibit A indicates?

"A. Yes. Just what the book shows.

"Q. Do you recollect the engineer who drove that train that night?

"A. I couldn't swear to that because I don't bother the engine crew. I have nothing to do with it."

Then Mr. Hyde asked this question:

"Recross-examination.

By Mr. Hyde:

"Q. But you do recall that this train did come in the Ashley freight yard on the morning of July 27th, 1934, and that you inspected it?

"A. Yes, sir."

Then Mr. Kaufman, the attorney for the plaintiff asked this question:

"Q. Do you recall whether you discovered any blood stains on any of the wheels of the cars?

"A. If we would have discovered it we would have made a notation of it but our records don't indicate it."

That is the entire examination.

[fol. 297] Victor H. Deppi, called as a witness on behalf of the defendant, being duly sworn, testified as follows:

Direct examination.

By Mr. Kiendl:

Q. Mr. Deppi, you are a car inspector in the employ of the Central Railroad Company of New Jersey?

A. Car inspector foreman.

Q. Car inspector foreman?

A. Yes, sir.

Q. Located where?

A. Penobscot, Pennsylvania.

Q. At Penobscot?

A. Pennsylvania.

Q. And were you such car inspector foreman at Penobscot on July 27, 1934?

A. I was acting car inspector foreman.

Q. Did there come a time on that morning when you got a request to inspect certain cars in that yard?

A. Yes, sir.

Q. Did you get that request from someone in the Erie Railroad Company?

A. The request for that inspection came over the telephone to my office to the attendant there and he did not determine from whom it came. He gave me the information.

Q. When you got the information do you remember what time it was in the morning, about?

A. Well, I would say about 11 o'clock when I got the information.

Q. When?

A. About 11 a. m.

Q. About 11 a. m.?

A. Yes.

Q. Had the train come into that Penobscot yard that morning from Ashley?

A. Not a train.

Q. Had some cars come in from Ashley?

along and taking numbers of the cars going up and picking the 14th or 18th and starting there, do you?

A. Oh, yes; I do.

Q. You do?

A. Yes, sir.

Q. When? Stop and think before you answer. One occasion or more?

A. Yes, on different occasions.

Q. Well, give me any one of the occasions.

A. I can't tell you just what occasion, but I saw the checker do it.

Q. Were you watching him?

A. Oh, yes; checking.

Q. Were you interested in what he was doing?

A. Yes; the checker checks the train with the inspector.

Q. Your first answer is, however, that as a general proposition anybody that is going over a train to get either numbers or inspect it or anything else usually starts from one end or the other. That answer still stands, does it?

A. Yes, to my line of work.

Q. Well, let me ask you, Mr. Alworth? They start to break this train up, do they not, right after it gets in there?

A. No.

Q. What?

A. No, not right after it gets in there.

Q. When do they start to break it up?

A. Well, they don't start to break it up until I notify [fol. 284] the yard master.

Q. Yes. Well, how long after this accident was it before they started to break this train up and put parts of it on one siding and parts on another, depending on where they want the cars to go?

A. Well, I don't know that.

Q. You don't know how long it was?

A. No, I don't know that.

Q. Now, you in your work occasionally, and frequently every day of your life, you are walking through the yards, are you not?

A. Yes, sir.

Q. Now, you may be going to lunch or you may be on your way to some work or something of that kind?

A. Yes, sir.

Q. And if you were passing by a train with which you

had nothing to do, you were not to inspect it or anything of that kind; do you understand?

A. Yes, sir.

Q. You pass many a car and many a train in the yard there that you had nothing to do with it at that particular time?

A. Yes, sir.

Q. And if you were going along and you found a car with a door open, you would, I presume, as a common sense man, go up and close it, would you not?

A. Yes, sir.

Q. And if it was a box car, would you close a box car door or leave it open?

A. I would close it.

Q. Just push it to and close it?

A. Close it and put the latch on.

Q. And if it was a reefer door you would close it, and that has a little latch that just drops in a slot there?

A. Yes, sir.

Q. Something like the handle on a refrigerator snap?

A. Yes; and it goes through a staple there.

[fol. 285] Q. Yes, just drops in something like a refrigerator door that you have with a lock as you have in your home?

A. Somewhat the same type, on that order, yes.

Q. And you would go over and close it and go on your way?

A. Yes, sir.

Q. And as a matter of fact, you have done that many times, I mean as a man——

Mr. Kiendl: Oh, I object to that line of inquiry, if your Honor please. It is not what happened in other cases; we are interested in what happened here. It is not proper cross examination.

Mr. Hunt: What I am leading up to is that——

The Court: Cross examination. I will allow it.

Q. How many years have you been with the railroad?

A. About 25.

Q. And you have done something like that or similar in innumerable instances, over this period of years, have you not?

A. Well, I can't recollect that.

Q. Well, you don't wish to tell me how many times,

but you know you have done it, and that is what you would do or any other railroad man would do?

A. If I saw a door open I would close it, naturally.

Q. Certainly; and you have in your experience handled or inspected old cars as well as new ones?

A. Yes, sir.

Q. And tell me about this. One of your box cars that has a slide door and it has little casters on the top, and it is suspended by a rod and it rolls along that rod at the top?

A. Yes, sir.

[fol. 286] Q. And there is likewise a similar rod at the bottom.

A. Yes, sir.

Q. A rail, you might call it?

A. A track.

Q. A track, single rail, just a single rail, is it not?

A. Yes, sir.

Q. And I direct your attention particularly to the cars when they get of some age where they are old cars,—you understand what I mean?

A. Yes, sir.

Q. You know from your work as an inspector, do you not, the fact to be, on an old car, one of the common things you have to contend with is because that door jumps the lower rail. You know that as a fact, do you not?

A. They do.

Q. Yes, sir; and then you know when they jump, on the old cars, when they jump that lower rail, when you are going around a curve, that door just swings right out like that (illustrating), doesn't it, if you are going around a curve that way (indicating); if you are going around a curve as I am indicating now, and on those old cars where it jumps the lower rail, you know that door just swings right out away from the car, doesn't it?

A. Not when the door is latched.

Q. Latched, but if it is an empty car there is no latch on the door, is there?

A. Yes.

Q. But in nine times out of ten if it is an empty car the man who just closes that door never bothers to latch it; isn't that the truth about it?

A. No; empty cars is supposed to be latched.

Q. Yes, they are supposed to be, but I am talking about the practical side of it.

The Court: It is half-past four. If you think you can finish with this witness in five minutes, I will permit you to continue.

[fol. 287] Mr. Hunt: I am through right now, your Honor.

Mr. Kiendl: Then may I have a minute? This man comes from another railroad company, and I want to finish with him.

The Court: You may have five minutes.

Mr. Kiendl: I won't need that long, your Honor.

Redirect examination.

By Mr. Kiendl:

Q. In common sense practical railroading, Mr. Alworth, that Mr. Hunt has asked you about, have you ever seen a man close doors on reefer cars that had been opened with the seals intact? Could such a thing ever happen?

A. With the seals on the car broken?

Q. The seals on the car unbroken?

A. Unbroken?

Q. Unbroken; what would be the condition of the doors, as a practical railroad man? They would have to be closed, wouldn't they?

Mr. Hunt: Don't tell him.

A. Yes, and they are closed, and properly so.

Q. And when the seals are unbroken, the doors cannot open, can they?

A. No, sir.

Q. Now, assuming that the three reefer cars in this train you have told us about, that one had Erie seals on and the other had Erie seals on and the third had Erie seals on, was there any way in which any man in the employ of the Central Railroad Company of New Jersey in Ashley could put Erie seals on those cars, that you know of?

A. Not that I know of.

[fol. 288] Mr. Kiendl: That is all.

The Court: Gentlemen, don't discuss this case amongst yourselves or with anyone else, and we will adjourn until tomorrow morning at ten-thirty a. m.

(Adjourned to October 7, 1936, at 10:30 a. m.)

New York, October 7th, 1936,
10.30 o'clock a. m.

(Trial Resumed.)

Mr. Kiendl: If your Honor please, the defendant desires to read in evidence the deposition of the witness Stephen Probola, who is now deceased, and whose evidence was taken on deposition by the plaintiff in this action.

The Court: All right.

Mr. Kiendl (reading):

STEPHEN PROBOLA, a witness on behalf of the plaintiff, being first duly sworn, testified as follows:

"Direct examination.

"By Mr. Kaufman:

"Q. Will you please state your name and address?

"A. Stephen Probola, 85 Barney Street, Plymouth, Pa.

[fol. 289] "Q. What is your occupation?

"A. Car inspector with the Central Railroad of New Jersey.

"Q. Were you on duty on the morning of July 27, 1934?

"A. Yes, sir.

"Q. Did you inspect the Erie freight train that came in the Ashley yard from Avoca on that morning?

"A. Yes, sir.

"Q. Will you please tell me how you inspected this train, exactly what you did?

"A. My buddy and I, Mr. Alworth, were the only two men who inspected this train. We put our both flags up on both ends of the train and we started inspecting all parts of the car. We looked over the cars.

"Q. Where did you start?

"A. I just don't remember. Sometimes we start on the east and sometimes on the west end. Sometimes we are

down the lower end of the car and start on both ends of the train. The first thing I do is take the number of the first car and the initials, whether it is loaded or empty and put that in the record book.

"Q. Did you do that with this train.

"A. Yes.

"Q. Do you have the record book here where you made these notes?

"A. Yes.

"Q. Is this the record book (indicating)?

"A. Yes. That is my handwriting."

Mr. Kiendl: And the book in question is a book that is now evidence, three pages of it, Defendant's Exhibit G.

(Continuing reading:)

"Q. Now you say that you and Mr. Alworth separate at the end of the train and you proceed to examine both [fol. 290] sides of the train and when you get to the first car you make a note of the car number and initial?

"A. Yes, whether it is a box car or tank, and whether it is loaded or empty.

"Q. And you put this notation in Plaintiff's Exhibit A (which is Defendant's Exhibit G)?

"A. Yes.

"Q. All of the entries in Plaintiff's Exhibit A (Defendant's Exhibit G) are in your handwriting, is that correct?

"A. Yes, all in my handwriting.

"Q. Do you remember exactly the manner in which you examined that car on July 27th?

"A. I do not.

"Q. What phases of the examination is it that you don't remember exactly?

"A. I don't know what you mean. Do you mean examining the train?

"Q. Yes.

"A. Well, I examined it for all defects.

"Q. How did you examine it for all defects?

"A. By looking for defects.

"Q. How did you look for defects?

"A. I bent down and looked at the cupboard, the wheels.

"Q. When you look at the wheels, what do you look for?

"A. Cracks or blood or anything I find. If I find any-

thing wrong I take a record of it or if my friend on the other side finds anything.

"Q. Is that all you looked at?

"A. I looked at the sides, the safety appliances.

"Q What are the safety appliances?

"A. Grab handles, foot steps, cut levers, see that no siding is loose, nothing hanging.

"Q. What do you mean by 'siding'?

"A. The side of the car.

[fol. 291] "Q. Is that all you examine?

"A. I look to see that the doors are on their runners.

"Q. When you say you look at all these things, do you mean you just look at them and you can tell by a glance whether they are in condition?

"A. I look to see that they are on their runners.

"Q. Is that what your examination consisted of, your merely looking at them?

"A. Yes. We look at them and if something is wrong we repair them.

"Q. Would it be possible, Mr. Probola, to borrow this book, Exhibit A, until we get the testimony?

"A. I have no rights with that book.

"Q. And that's what your examination of the first car consisted of?

"A. Yes.

"Q. And after you examined the first car, what did you do?

"A. Take the number of the second car, the initials, whether it is loaded or empty. I did the same thing as the first.

"Q. And I assume that you did that with the balance of the cars in the train?

"A. Yes.

"Q. Do you recall whether or not, of your own recollection, you discovered any defects in the cars on that train?

"A. I didn't discover nothing. There were no defects. I don't think so. If there were they would be in the book.

"Q. Can you tell from an examination of the book?

"A. Yes.

"Q. Will you please tell me from an examination of the book whether there were any defects discovered?

"A. There was a cotter pin applied in Central N. J. 14145 Central N. Y. box empty cotter and brake pin on A. N. and

[fol. 292] 21639 Central New Jersey box empty one second-hand brake shoe and R. tube. That's about all we did.

"Q. Those are the only defects that were found in that train that evening?

"A. Yes, sir.

"Q. All the entries in Plaintiff's Exhibit A are in your handwriting?

"A. Yes.

"Q. In those cases where you found defects, you made entries in Plaintiff's Exhibit A?

"A. Yes.

"Q. Will you please explain to me how a record was obtained of those defects which Mr. Alworth found?

"A. He yells to me.

"Q. Did you repair the cotter pin and the brake shoe?

"A. Yes.

"Q. How long did it take you to repair the brake shoe?

"A. According to what luck you have with it.

"Q. Do you remember how long it took that morning?

"A. No.

"Q. About how long does it generally take to repair a brake shoe?

"A. Sometimes three minutes, five minutes, according to what luck you have.

"Q. Do you recall how long it took you to repair the cotter pin?

"A. No.

"Q. How long does it generally take to repair a cotter pin?

"A. A minute or two.

"Q. Does Plaintiff's Exhibit A indicate the order in which the cars were in relation to the locomotive? Was this car attached to this one (indicating)?

"A. Yes, sir.

"Q. Then Plaintiff's Exhibit A contains the order in which the cars were in relation with each other, is that correct?

"A. Yes.

[fol. 293] "Q. Do you remember which car was nearest the locomotive?

"A. No.

"Q. Will you please tell me the numbers, beginning from one end of the train of the respective cars making up that

Q. And who was your buddy?
A. Joe Cook.
Q. And is he here in court?
A. Yes, sir.
Q. Where did you and Mr. Cook inspect the train, Mr. Howell? Where was it?
A. On the back leader, what we call.
Q. That is what you railroad men call the back leader track?
A. Yes, sir.
Q. And is that the place where the Ashley Special, when it is made up, departs from Ashley for Avoca?
A. Generally, yes. Of course they make it up on different tracks, but this particular night it was on the back leader.
Q. On the back leader?
A. Yes, sir.
Q. Did you and your partner, Mr. Cook, inspect every car in that train?
A. Yes, sir.
Q. You on one side?
A. Yes, sir.
Q. He on the other?
A. Yes, sir.
Q. What did you inspect it for?
A. We inspected it for general defects.
Q. And did you find any?
A. No, sir.
Q. Did your partner find any that he reported to you?
A. No, sir.
Q. Did you find any evidence of any broken doors on any of the freight cars where the doors were off the runners on the bottom and you slide them?
A. No, sir.
[fol. 308] Q. Did you find any evidence of any doors on any refrigerator cars being left open and swinging?
A. No, sir.
Q. Did you keep a record of the inspection?
A. No, sir.
Q. Did you in your car inspector's record book make any notation of the inspection at any time?
A. The only notation I make of a car that would be a crippled car set out of the Ashley train.
Q. Were there any crippled cars set out of that Ashley train on that night?

A. No, sir.
Q. Is this your original record (handing)?
A. Yes, sir.
Q. And that was made in your own handwriting?
A. Yes, sir.
Q. Was it made that night or the next day or when?
A. It was made the next morning.
Q. Was it made before or after you had heard anything about the occurrence of any accident?
A. It was made after I heard of the accident.
Q. Now, will you read out from that record what you wrote in the book about your inspection?

Mr. Hunt: I object to anything written after he knew about the accident.
The Court: Yes, there is something to that.
Mr. Kiendl: Well, it is a record made—may I ask another question?
The Court: Yes.

Q. Was that record made by you in the performance of your duties in the course of your employment as a car inspector?
A. Yes, sir.
Q. Was it made for the purpose of maintaining an original record of the inspection you had made the night before?
[fol. 309] A. It was made—I made that record after I heard about the accident. I made the record in the book for reference to the accident.

Mr. Kiendl: I renew my offer in evidence.
Mr. Hunt: May I just ask one question before your Honor passes on it?
The Court: Yes.

Preliminary cross-examination.

By Mr. Hunt:

Q. You would not have made any record at all if you had not heard about this accident, would you?
A. Not unless I had a crippled car to set out.
Q. All right. There was no crippled car that you took out of this train, was there?
A. No, sir.
Q. All right, sir. Now, you would not have made any

A. Some cars had come in, yes, sir.

Q. And do you know if those cars were cars that came from the Ashley special?

A. Some were.

Q. Some were?

A. Yes, sir.

[fol. 298] Q. Well, when you got the call what did you do about it? Will you tell the Court and jury?

A. When I got the call I was occupied at the time and I got a car inspector to go out in the yard, and I instructed him to find the cars that came from the Erie Railroad and examine for defects, because there was someone evidently injured and he should inspect the cars closely, and he went out and inspected the cars in the yard.

Mr. Hunt: I will have to object to this, your Honor. He is now apparently telling us what someone else did.

Mr. Kiendl: Yes, don't tell what he did.

The Court: Objection sustained.

Q. Then did you see him again?

A. The inspector returned and said——

Mr. Hunt: No; pardon me.

The Court: Objection sustained.

Mr. Kiendl: Consented to.

Q. The inspector returned, then what happened?

A. The inspector returned and said there was——

Mr. Hunt: No; I beg pardon.

The Court: Objection sustained.

Q. Don't say what he said. The inspector returned and had a talk with you?

A. The inspector returned and reported finding some cars.

Q. And what did you do?

The Court: As a result of that report what did you do?

[fol. 299] The Witness: On his report him and I went back out and inspected the cars again.

Q. And did he point out certain cars to you?

A. Several.

Q. And did you inspect those cars for defects?

A. Yes, sir.

Q. Did you find any?

A. No, sir.

Q. Did you find any blood stains on any of the cars?

A. Yes, sir.

Q. And did you make a record of the cars on which you found blood stains?

A. Yes, sir.

Q. And have you that record with you?

A. I have given the record to you, I think.

Q. About how many cars, do you recall, showed blood stains?

A. I think there were seven.

Q. You think there were seven?

A. Yes, sir.

Q. Now, those seven cars you personally inspected for defects?

A. Yes, sir.

Q. Did you find any car doors open or swinging or off the tracks or broken?

Mr. Hunt: I object to any condition that existed at 11 o'clock in the morning, your Honor, as absolutely no evidence.

The Court: I will overrule the objection.

Mr. Hunt: Exception.

A. No, sir.

Q. Did you examine any other cars in the yard outside of those seven that morning?

A. In my regular tour of duty, yes.

Q. And did you find in your regular tour of duty that there were any cars in that yard with broken or defective doors?

[fol. 300] Mr. Hunt: I object to it as incompetent, irrelevant and immaterial.

The Court: Overruled.

Mr. Hunt: Exception.

A. No, sir.

The Court: This inspection took place at 11 a. m., did you say?

The Witness: Approximately 11 a. m.

Q. You were examined as a witness by the plaintiff in Pittston, Pennsylvania?

A. Yes, sir.

Q. And there the numbers of these cars were given?
A. Yes, sir.
Q. As part of the testimony?
A. Yes, sir.

Mr. Kiendl: And subject to finding those books I am through with this witness.

Cross-examination.

By Mr. Hunt:

Q. Anything that you did in regard to any cars was done at 11 o'clock in the morning, as I understand it, or approximately that time?
A. Approximately, yes.
Q. Now, sir, at the time this train——

The Court: You will pardon me, Mr. Hunt. 11 o'clock in the morning of what date?
The Witness: July 27th.
The Court: July 27th?
The Witness: Yes, sir, the same morning the Erie Special arrived.

[fol. 301] Q. And at the time this Erie train, this Ashley Special, had been all broken up, to use the railroad language, broken up, and a part of the cars had gone on their way, is that right, part of those 38 cars were already out of your yard and on their way somewhere?
A. No, sir.
Q. They were not?
A. Out of my yard, no, sir.
Q. What is that?
A. They were not out of Penobscot yard.
Q. The 38 cars were all there at 11 o'clock?
A. No, sir.
Q. Where were they?
A. I don't know.
Q. Well, some of them—where were these 38 cars at 11 o'clock?
A. Some were at Penobscot.
Q. Well, Penobscot, is that where you were?
A. That is where I was.
Q. At that time somewhere at Penobscot?
A. Yes.

Q. Where were the rest of them?

A. I don't know.

Q. Then they were not at Penobscot?

A. No, sir.

Q. They had gone somewhere?

A. They had not arrived at Penobscot.

Q. Oh, some of them did not arrive at Penobscot, is that correct?

A. Yes, sir.

Q. How far is Penobscot from Ashley?

A. Well, by way of the highway it would be about four miles; over the plains it would be about four miles, and by the back track I would say it is about thirteen miles.

Q. Well, by railroad.

A. Well, the plains is by railroad.

Q. Well now, this gentleman yesterday that told about inspecting the grab irons and the brake shoes, where was that inspection made?

[fol. 302] Mr. Kiendl: That was at Ashley.

Mr. Hunt: I want to get it straight.

Q. That was at Ashley?

A. Yes, sir.

Q. And then at Ashley this train—where is this train originally broken up, at Ashley?

A. Yes, sir.

Q. And there the part of it that is going in one direction is put on one track and the part that is going in another direction is put on another track, and finally they get them on the way out of Ashley?

A. Yes, sir.

Q. Now then, a part of that train came into Penobscot?

A. Yes, sir.

Q. Have you any idea how many cars came into Penobscot?

A. No, I have not.

Q. Have you any record to show how many cars came into Penobscot?

A. There is a record at Penobscot, but I don't have it.

Q. And wherever the rest of the cars went, wherever they may have gone, the balance of that train, there would also be a record of those, would there not?

A. Not at Penobscot.

Q. Not at Penobscot, but wherever they went there would be a record?

A. Yes, sir.

Q. Somebody somewhere knows as much about the other cars as you know about those that came into Penobscot, correct?

A. Yes, sir.

Q. Now, sir, you are classified as a chief inspector?

A. Car inspector foreman or foreman car inspector.

Q. And if you are going along the yard and you see a door open, you close it, do you not? That is common practice?

A. No, sir, I go to the inspector that did not close it and have him close it.

Q. Oh, you go to him?

A. Yes, sir.

[fol. 303] Q. Well now, at any rate somebody closes it, do they?

A. Yes, sir.

Q. An empty car or loaded car, either one?

A. If it is a loaded car he reports immediately.

Q. Yes; and the record is kept of that?

A. Yes, sir.

The Court: On that day that you inspected the cars, you were acting as an acting inspector?

The Witness: Yes, sir, acting foreman.

The Court: Acting foreman?

The Witness: Yes, sir; foreman car inspector.

The Court: And was it your duty to inspect cars as foreman?

The Witness: Well, in a case of this kind I was too—any decision that the inspector—to be made, I was to make it. I have charge of all the inspectors.

Q. You say, Mr. Deppi, if you found a car door open going through the yard, you go to the inspector whose duty it was to see that the doors were closed, and it is in the nature of a complaint against him, is it not?

A. Yes, sir.

Q. You tell him so, don't you, being foreman?

A. He knows it.

Q. He knows it. Now then, if any one of those inspectors themselves, or any railroad man, whether he is a brakeman

or anybody else, if he sees a door open, he doesn't come and tell you some other inspector did not do his work just right, does he? They don't squeal on each other or anything of that kind?

A. No, sir.

Q. But on the other hand there is a tendency for the [fol. 304] brakeman and all the men to sort of cover these things up?

Mr. Kiendl: I object to that, if your Honor please, as pure speculation.

The Court: Objection sustained.

Mr. Hunt: That is all.

Redirect examination.

By Mr. Kiendl:

Q. Mr. Deppi, the record books that you referred to are these two which I now have in my hand, are they not?

A. Yes, sir.

Q. And they show blood stains on various cars?

A. Yes, sir.

Q. Will you just read the initials and numbers of those cars so we will have them?

A. CNJ85571; L1 and 4, south side flanges, most L2 and 3; PRR52659, south side R1, 2, 3 and 4; D & H 15110, left side L3—that is on the south side; Erie 75983 south side R1, 2, 3 and 4; Erie 79543, L1, 2, 3 and 4 south side; Erie 84036, south side R1, 2, 3, and 4; Erie 92607 south side L1, 2, 3 and 4.

Mr. Kiendl: I think Mr. Hunt will be willing to stipulate that the cars just mentioned by the witness, all with the exception of two, were cars enumerated in the various exhibits containing a list of the cars in the Ashley Special.

Mr. Hunt: Yes, but there were two cars mentioned that were not found on the list.

Mr. Kiendl: That is right.

Q. Now, Mr. Deppi, where did you find the bloodstains?

A. On the flanges of the wheels on the inside.

[fol. 305] Q. Inside flanges of the wheels of these cars?

A. On the inside of the flanges of the wheels.

Q. That is where the flanges run along the inside of the rail of the track?

A. That is what I referred to as the flange, but I would say on the inside of the wheel back of the flanges.

Recross-examination.

By Mr. Hunt:

Q. It had been raining very, very hard that morning, had it not?

A. It had rained that morning, yes.

Q. Hard?

A. Well, it rained hard in the morning early and was foggy and misty and the rails and the wheels were mucky.

Mr. Hunt: That is all, sir.

(Short recess).

Roy Myers, called as a witness on behalf of the defendant, being duly sworn, testified as follows:

Direct examination.

By Mr. Kiendl:

Q. Mr. Myers, you are an employee of the Central Railroad Company of New Jersey?

A. Yes, sir.

Q. Been in the employ of that company for some years?

A. 11 years.

Q. You are a car inspector?

A. Yes, sir.

Q. At Penobscot, Pennsylvania?

A. Yes, sir.

Q. Were you car inspector on July 27, 1934, the day when this accident happened?

A. Yes, sir.

[fol. 306] Q. And were you performing your duties as car inspector?

A. Yes, sir.

Q. Did you get some instructions from your superior, acting car foreman Deppi, the man who was on the stand before you?

A. Yes, sir.

Q. Did you go out and inspect certain cars in the Penobscot yard to find evidence of any defects, bloodstains or things of that kind?

A. I found bloodstains but I did not find any defects.
Q. And did you report back to Mr. Deppi?
A. Yes, sir.
Q. And give him the numbers of the cars?
A. No, I did not.
Q. You did not?
A. No.
Q. Did you take him out with you afterward?
A. Yes, sir.
Q. And did he look at the cars with you?
A. Yes, sir.
Q. And where were the bloodstains?
A. On the inside of the wheel right above the flange.

Mr. Kiendl: That is all.
Mr. Hunt: No cross.

Albert Howell, called as a witness on behalf of the defendant, being duly sworn, testified as follows:

Direct examination.

By Mr. Kiendl:

Q. Mr. Howell, what is your occupation?
A. Car inspector.
Q. Where?
A. Avoca yard.
Q. Of what railroad?
A. Erie Railroad Company.
[fol. 307] Q. How long have you been such a car inspector, Mr. Howell?
A. About 18 years.
Q. Were you car inspector the night when this Ashley Special went from Avoca to Ashley?
A. Yes, sir.
Q. Did you have anything to do with the inspection of the cars in that train?
A. Yes, sir.
Q. Did you work alone or did you work with somebody else inspecting?
A. I worked one side of the train and my buddy worked on the other.

record at all in this case had it not been that somebody told you there was an accident. Is that correct?

A. I heard about the accident, and that is why I put that notation in the book.

Q. If you had not heard about any accident the next morning you never would have made any record, you never would have made any writing at all, would you?

A. No, sir.

Q. So that this writing was not made in the regular course of your business, but it was made because somebody told you there had been an accident on the Ashley Special, am I correct?

A. That is right.

Mr. Hunt: I again object.

[fol. 310] Direct examination resumed.

By Mr. Kiendl:

Q. And when you are informed about the occurrence of an accident on a train that you inspect, do you make a record of that in your book?

A. The only record I make in my book is a car that I set out of the Ashley train as a cripple.

Q. Let's approach it another way. You made an inspection of the Ashley Special?

A. Yes, sir.

Q. If you find any defective or if you find any cars that have to be shopped, do you or do you not make a record?

A. I do.

Mr. Hunt: I object to that.

The Court: I will overrule the objection.

Mr. Hunt: Will your Honor listen to me a moment?

The Court: Yes.

Mr. Hunt: I have no objection to the question, but he has incorporated two things in that question. He says "if you find any defects or if you found a crippled car."

Mr. Kiendl: That is what I meant to ask.

Mr. Hunt: I want him to separate it, that is all I ask.

The Court: All right; counsel can do that.

Q. In the regular performance of your duties, when you inspect a train, if you find any defects in any of the cars in the train, do you make a record of it?

A. The only record I make is of a car set out of the train.

Q. Well, if you find any defects in any car do you make any record of them—if you find a broken door, a broken seal or anything of that kind?

[fol. 311] Mr. Hunt: I object to that as leading and suggestive.

The Court: Overruled.

Mr. Hunt: Exception.

A. Yes, sir.

Q. You do, don't you?

A. Yes, sir.

Q. That is part of your duties as a car inspector?

A. Yes, sir.

Q. If you find anything wrong in a car to record it?

Mr. Hunt: I object to that as leading.

The Court: Overruled.

A. Yes.

Q. Now, if you shop a car, you record that in the book, don't you?

A. Yes, sir.

Q. And if there is nothing wrong with the cars in the train you do not make any record of it?

A. That is right.

Q. But if you hear there is an accident to the train that you have inspected before it departed, you do make a record of that?

A. Yes, sir.

Q. And that is what you did in this case?

A. That is right.

Q. And that is the original record?

A. That is right.

Mr. Kiendl: I renew my offer.

Mr. Hunt: Objected to.

The Court: Objection overruled.

Mr. Hunt: Exception.

Mr. Kiendl: I offer it in evidence from the book, maybe I may read it in and it won't clutter the record, it is not very long:

[fol. 312] "Ashley Special departed 2.10 a. m., 38 cars and 38 brakes, train O. K., conductor Keller, engine 2499."

You may inquire.

Cross-examination.

By Mr. Hunt:

Q. Mr. Howell, in the railroad business when you find a car that has got to be shopped—you know that is an expression, isn't it—it has got to go to the shop?

A. That is right.

Q. And you take that out of the train?

A. That is right.

Q. And that you make a record of?

A. That is right.

Q. What was your expression—in going down through this train—did you find any car that had to be taken out?

A. No, sir.

Q. Now, do you make any record except in cases where a car has to be removed from the train?

A. I make a record in my book of the defects of the car.

Q. Now, sir, we will say you go along until you come to something that you yourself could fix right then and there, you understand?

A. Yes, sir.

Q. So that you would not have to take the car out of the train, in your judgment, understand?

A. Yes, sir.

Q. Do you make any record of that? Can you answer that?

Mr. Kiendl: He is trying to answer it if you give him a chance.

A. I make a record of that in my book.

Q. You do, sir?

A. Yes, sir.

[fol. 313] Q. Well, I have your book here, haven't I?

A. Yes, sir.

Q. Will you take your book and take any day you wish and show me any record in that book where you did not take the car out of the train, any record of any defect of any kind where you did not pull that car out of the train? Can you do that, sir?

A. Well, if I have a record of it I can show you that; if I have none, I can't.

Q. Well, you said you made a record of defects.

A. When the cars are O. K. there is an O. K.

Q. What is that?

A. I take records of the cars——

Q. Look carefully and find us any record, any repair that was made to a car where you did not take the car out of the train.

A. I don't find any here that I have made any repairs to.

Q. You don't find a record of a single thing except the cases where you took the car out of the train?

A. Where we set a car out.

Mr. Kiendl: A little louder, please.

The Witness: No record, only except where we set the car out. That is the only record we have in that book.

Q. All right, sir.

A. That I could find.

Q. You have been an inspector how many years?

A. About 18.

Q. And you are a foreman inspector?

A. No, sir.

Q. And if you find—what do you do if you are walking along and you find a door of a car open, what do you do?

A. Close it.

Q. Yes; just push it, if it is the old side door palace car, you just get behind it and push it closed?

[fol. 314] Mr. Kiendl: Side door what?

Mr. Hunt: Side door palace car, box car—if it is a box car you just push the car door *too*, do you?

The Witness: And close it and hook it.

Q. Do you hook it?

A. Yes, sir.

Q. Well, if you were going by and happen to see a door open, you hook it, do you?

A. Yes, sir.

Q. And you are supposed to hook it, are you?

A. Yes, sir.

Q. How tall are you?

A. Oh, about 5 feet 4, something like that.

Q. And these box cars are loaded from a platform that is about approximately the level of the car floor or from a truck that is approximately the level of the car floor, correct?

A. Well, I don't know where they are loaded or how they are loaded.

Q. Well, come right down to it. This hook on a box car door is how high from the ground?

A. Oh, I should judge about maybe four feet, something like that.

Q. Well, how high is the floor of the car from the ground?

A. Well now, there is different spots on the ground, you know; there is spots where it is higher and spots where it is lower.

Q. Yes, but let's try to hurry along and get it as nearly as we can. Standing alongside of a box car, how high is the floor from the ground, the floor of the car?

A. I told you there is different spots in the ground where it may be higher and maybe lower.

Q. All right. Now we are going to assume a spot, we are going to assume a place that is absolutely level with the road-bed. Do you follow me?

A. Yes.

[fol. 315] Q. Now, assuming you are standing on a spot that is level with the road-bed, how high is the floor? Won't you tell these gentlemen how high is the floor of a car?

A. Oh, I should judge about probably three feet.

Q. How much?

A. Probably three feet.

Q. And after all your years of experience you think the floor of that car is just a yardstick from the ground, right?

A. All, I am just giving a rough estimate, that is all.

Q. Let's see now, then. The door, how high is the door, what is the height of the ordinary box car?

A. Oh, I should judge about eight feet.

Q. And your latch is where on that door, what part of it, about the middle?

A. No.

Q. What?

A. No.

Q. Isn't the latch on that door approximately half way up that door?

A. No, sir.

Q. It is not?

A. No, sir.

Q. It is not?

A. No.

Q. No?

A. No.

Q. Well, where is it, sir?

A. It is about three-quarters down.

Q. Three-quarters down, so it would be one-quarter of eight feet, about two feet up from the bottom?

A. Probably about a foot and a half.

Q. All the box car doors in your experience that you have seen, the latch on the door is about a foot and a half from the bottom. Now, that is true, is it?

A. Yes. Well, giving a rough estimate, about a foot and a half or two feet.

Q. It could not possibly be three feet from the floor of the car, the latch, could it?

A. No, sir.

Q. What?

A. No, sir.

Q. All right. Now, one of your difficulties with your old cars is that after they have been running over the roads for [fol. 316] thousands of miles and around the curves and all that, one of your difficulties is, you know as a railroad man that—I am referring to a box car—your lower part of that door jumps that track on which it rides; that is one of the common complaints, is it not?

A. No, sir.

Mr. Kiendl: If your Honor please, I have no objection to this line of cross-examination if it is done with the understanding that Mr. Hunt is making the witness his own witness for this purpose. It involves matters concerning which the witness was not examined on direct examination at all.

The Court: I don't say that they were, Mr. Kiendl, but I will overrule your objection.

Mr. Kiendl: May I have an exception, just to reserve that point, that contention?

The Court: Yes.

Q. In your experience as a railroad man, you say you don't know about the lower end of these box cars doors jumping that rail?

A. Yes, sir.

Q. You mean when you say yes, sir, you mean what, that you know about it or you don't know anything about it?

A. I know that I have not heard or seen any of them do it.

Q. You have not heard and you have not seen anything?

A. No, sir.

Q. You never heard—now, as an inspector—were you here in court yesterday?

A. Yes, sir.

Q. You didn't even hear about it yesterday?

A. I mean in my experience.

Q. You mean you never with your own eyes actually saw them?

A. No, sir.

[fol. 317] Q. Have you heard about the lower end of these box car doors jumping the rail?

A. No, sir.

Q. As a railroad man, do you know anything about the proposition that where it usually occurs is when a train is distorted in going around a bend? Did you know that is when it most frequently happens?

A. No, sir.

Q. Now, where is the latch, sir, on your reefer cars, how high, about, from the floor of the car?

A. Well, I would say probably about two feet.

Mr. Hunt: That is all.

Redirect examination.

By Mr. Kiendl:

Q. And you have been an inspector for this railroad company for 18 years?

A. Yes, sir.

Joseph J. Cook, called as a witness on behalf of the defendant, being duly sworn, testified as follows:

Direct examination.

By Mr. Kiendl:

Mr. Hunt: Your Honor, in the light of the cross-examination and what developed, I mean, I think I would have to ask this book now to go into evidence and have it marked in evidence.

Mr. Kiendl: I have no objection. I will put the whole book in evidence.

Mr. Hunt: That is what I mean.

The Court: All right.

(Marked Defendant's Exhibit H.)

[fol. 318] Mr. Kiendl: May I call the Court's and the jury's attention to the fact that the book covers a period beginning on June 25, 1934, and ending on August 1st, 1934, a period of two months and five days.

Q. Were you the man that worked with the last witness as a car inspector?

A. Yes, sir.

Q. On the night of this accident?

A. Yes, sir.

Q. How long had you been a car inspector, Mr. Cook?

A. 17 years.

Q. And all that time at Avoca?

A. Yes, sir.

Q. And did you with Mr. Howell make a joint inspection?

A. Yes, sir.

Q. Of this Ashley freight train that went to Ashley?

A. Yes, sir.

Q. And was it on this back leader that Mr. Howell mentioned?

A. Yes, sir.

Q. Now, what did you do and what did Mr. Howell do in the way of inspecting that train before it departed from Avoca?

A. Well, we started from the caboose and worked towards the engine and made a general inspection of the cars, safety appliances, wheels, trucks, anything that was protruding from the cars and the doors and looked that the doors were all hooked, and safety—that is safety appliances, ladders, couplers and so forth.

Q. And that was in the performance of your duties?

A. Yes, sir.

Q. And that was the job you were supposed to be performing and the job you were doing and being paid for?

A. Yes, sir.

Q. You went down one side of the train yourself?

A. Yes, sir.

Q. It was at night, wasn't it?

A. Yes, sir.

[fol. 319] Q. Did you and Mr. Howell have any kind of lights with you?

A. Yes, sir.

Q. What kind?

A. Carbide lamps.

Q. Carbide lamps?

A. Yes, sir.

Q. Are those the lamps that burn carbide gas and have reflectors?

A. Yes, sir.

Q. Any difficulty of seeing conditions with those lamps?

A. Oh, no.

Q. Did you find any defects?

A. No, sir.

Q. Anywhere along this train when you examined it and inspected it that night?

A. No, sir.

Q. Did you keep any record or did Mr. Howell keep it?

A. Mr. Howell keeps the record book.

Mr. Kiendl: You may examine.

Cross-examination.

By Mr. Hunt:

Q. I just want to ask you, we have not inquired about the nature of this so-called seal. You close the door of a car, and what is this seal made of?

A. Well, it is made of some kind of a tin, some of them, some of them is made of wire and a piece of lead.

Q. It is either a little piece of wire and then it has a piece of lead on the end that you take and there is some kind of——

A. Well, I don't exactly know what they do. They fasten it in there some way.

Q. Well, it is a thing that you hold in your hand and pull that lead in, if you get it in just right, you take both ends there where there is a piece of lead on one end, and then you clamp the lead and that squeezes them together, do you not?

A. Just about that way. I have never seen it done, but I imagine it is that way.

[fol. 320] Q. And the other piece is a little thin piece of tin, sometimes they use a little thin piece of tin?

A. Yes, sir.

Q. And clamp it?

A. Yes, it automatically clamps itself, as I understand it. I have never seen it done.

Mr. Hunt: That is all.

La Verne E. Rose, called as a witness on behalf of the defendant, being duly sworn, testified as follows:

Direct examination.

By Mr. Kiendl:

Q. Mr. Rose, you are in the employ of the Railroad Company?
A. Yes, sir.
Q. In what department?
A. Engineering department.
Q. Are you a civil engineer?
A. Yes, sir.
Q. And have been for how long?
A. In the employ about 18 years.
Q. And at the request of the Railroad Company did you as an engineer do anything in the territory we are interested in here between Avoca and Rock Street?
A. I did.
Q. Did you go down there to the Rock Street crossing?
A. Yes, sir.
Q. Did you take certain measurements and make certain observations of conditions there?
A. I did.
Q. Location of the tracks, the grades, the levels and things of that kind?
A. I did.
Q. Now can you tell us, Mr. Rose, how far Rock Street crossing is——

[fol. 321] Mr. Hunt: May we have just one question as to when he made these measurements?

Q. When did you do these things? Did you do them in 1936 or prior or when?
A. On several occasions.
Q. In what years, do you remember?
A. I will have to look at my notebook before I can tell you that. I was in that vicinity on June 25, 1934.
Q. June 25, 1934?
A. Yes; August 27, 1934; September 5, 1934; April 19, 1935. That is all that I have record of.
Q. The first one was June 25, 1934?

A. Yes, sir.

Q. Before the accident that we are here involved with ever occurred?

A. Yes, sir.

Q. Now will you tell us first, Mr. Rose, how far it is from Avoca freight yard of the Erie Railroad Company to the Rock Street crossing, about? I don't want it in feet or inches.

A. From Avoca yard to Rock Street it is about two miles.

Q. And you are familiar with the railroad track that comes through from Avoca to Rock Street?

A. Yes, sir.

Q. Do you know and can you tell this Court and jury whether that railroad is double-track or a single-track through there?

A. Single-track.

Q. Do you know, and will you tell us whether it is a track that is on the level or up-grade or down-grade running from Avoca to Rock Street?

A. From Avoca to Rock Street it runs up-grade.

Q. All the way?

A. All the way.

Q. Do you know what the grade is, the average grade through there, that distance of close to two miles?

A. It will average about .82 per cent.

[fol. 322] Mr. Hunt: May I have that again?

The Witness: 82/100 per cent.

Q. Well, a 1 per cent grade is a rise of 1 foot in a hundred feet, isn't it?

A. Yes, sir.

Q. And this rise, the average would be 82/100 of a foot for each 100 feet of track?

A. That is right.

Q. And that continues about that average all the way up to Rock Street?

A. Yes, sir, that is about the average.

Q. And after Rock Street, across Rock Street, some distance down the track, does the track level up?

A. Why, there is a vertical curve about a half mile beyond Rock Street, the grade starts to descend toward Plains Junction, and there would be a vertical curve in between the two grades.

Q. And that up-grade from Avoca to Rock Street, is the track all straight, or is there any curve in it as you approach Rock Street?

A. No, there is a curve, level curve.

Q. And that curve, part of it shows on the map that you prepared, that has been offered in evidence here as Plaintiff's Exhibit 1, does it not, to the right of the lower part of the map?

A. Yes, sir.

Q. And that shows the curve of the track approximately to a point 300 feet from Rock Street, does it not?

A. That is right.

Q. Now, can you tell us, Mr. Rose, if you know, from a point opposite Hughes Street on the railroad track, about how far down the track can you see in the direction of Avoca?

A. Opposite Hughes Street?

Q. Yes.

A. If I was standing in the track I could probably see about 400 feet.

Q. And standing alongside the track?

A. If I was standing east——

[fol. 323] Q. To the west of the track?

A. To the west of the track I could see further than that.

Q. Can you tell us about how much further?

A. Well, if I was standing, say, 8 or 10 feet away from the rail I could probably see 600 feet.

Q. Now, that curve continues, does it not, down toward Avoca, a portion not shown on this map?

A. Yes, sir.

Q. And what curve is that?

A. Why, it varies.

Q. And the average of it, is it a large curve, a small curve, or what do you call it as an engineer?

A. Well, at that locality it would be a medium curve.

Q. A medium curve?

A. Yes.

Q. That is the way you would describe it?

A. Yes.

Q. Now the portions you have not shown here, Mr. Rose, have you examined particularly the land that lies between the railroad tracks to the east, the picket fence to the west, Hughes Street to the north and Rock Street to the south?

A. Yes, sir.

Q. And have you seen these pictures that have been offered in evidence of that territory?

A. Some of them.

Q. Some of them you have seen, haven't you?

A. Yes, sir, I have seen some.

Q. Now, do you find a ditch or drain running from the crossing sign at Rock Street down toward the edge of the fence at Rock Street?

A. Yes, sir.

Q. And does that ditch or drain, whatever you call it, show in this photograph, the fifth one in Defendant's Exhibit C? Is that the one you are talking about?

A. Yes, sir.

Q. Now will you tell us, if you can, Mr. Rose, what is the depth of that ditch there that is right here in this pic-
[fol. 324] ture (addressing jury).

A. Well, it varies, the depth.

Q. What is its deepest depth? I am speaking below the level of the ground as it is there.

A. About one foot and 9/100ths.

Q. Slightly over 12 inches deep?

A. About 13 inches.

Q. At its deepest point?

A. Yes, sir.

Q. Have you walked across that ditch?

A. Yes, sir.

Mr. Hunt: Objected to as irrelevant, incompetent and immaterial.

The Court: Overruled.

The Witness: I have.

Q. Once or frequently or how often? A number of times?

A. A number of times.

The Court: Can anybody walk over that ditch without having any assistance?

The Witness: Oh yes.

Q. Any able-bodied man that is able to walk, would he have any difficulty in walking over that ditch?

Mr. Hunt: I object to the form of the question.

Mr. Kiendl: Well, maybe it is defective.

Q. Would any able-bodied man, in your opinion, from your examination and inspection of that ditch, have any difficulty in walking over it?

Mr. Hunt: I object to it on the same ground, it is incompetent.

[fol. 325] The Court: Overruled.

A. No, sir.

Q. In addition to the ditch, there has been some testimony here to the effect that there was a ditch alongside the fence running from Hughes Street to the south—from Rock Street to the south to Hughes Street from the north. Did you find any ditch there of any size or consequence?

A. No, sir.

Q. Was there any depression running along that fence,—a little low ground or something of that kind?

A. Well, there are some irregularities.

Q. Some irregularities?

A. Yes, but no defined ditch.

Q. Now, leaving the ditch, the Rock Street ditch, if I may call it that, and leaving the fence, the territory between the railroad track and the fence, is that level land or does it slant downward toward the fence?

A. It slants downward from the track to the fence.

Q. And from Rock Street on the one hand to Hughes Street on the other, that slant is about how much, measured from the railroad track, the last part of the ties of the railroad track to the fence, about what is it?

A. An average of about 4 feet.

Q. It averages about 4 feet?

A. Yes.

Q. And what is the average distance by actual measurement from the fence to the ties?

A. To the ties?

Q. To the ties.

A. That would be about 32 feet.

Q. About 32 feet?

A. Yes, sir.

Q. Did you at any time walk over any portion of that part of land between the fence and the railroad tracks Hughes Street and Rock Street?

A. Oh yes.

[fol. 326] Q. Have you walked over all that, practically?

A. Yes, sir.

Q. Have you examined and inspected all of it?

A. Yes, sir.

Q. Now tell the Court and jury in your own way, if you will, Mr. Rose, what you found there.

Mr. Hunt: May I have the date of this inspection, please.

Mr. Kiendl: Well, you have had the dates of all the inspections.

Mr. Hunt: Well then, I object to any inspection made before this accident. I object to any inspection made at a time that is remote after the accident.

The Court: Overruled.

Mr. Hunt: Exception.

The Court: You may state. Go right on.

The witness: Well. I made the inspection of the ground on each and every occasion that I was down there.

Q. Yes. Now, what did you find? Tell us in your own way.

A. The ground slopes from about 2 inches below the top of the tie toward the fence at an average probably about 4 feet down-grade to the fence, which is about 32 feet away from the end of the ties. It is not a sharp slope. You can walk down it without any difficulty.

Mr. Hunt: I move to strike out the last part of the answer.

The Court: You can walk down without any difficulty from where?

The Witness: From any point from the track to the fence between Rock and Hughes Street.

[fol. 327] The Court: I will let it stand.

Mr. Hunt: All right.

Q. Now, what sort of material is there in there, Mr. Rose? Is that all earth or is it a fill, or do you know?

A. Why, that is what we call a side hill cut.

Q. A side hill what?

A. A side hill cut in that vicinity. The top at the present time is mostly cinders.

Q. Can you state, Mr. Rose, what the condition of the surface of that land is in there leaving out the ditch that I was talking about and that unevenness toward the fence, is

it all perfectly level like a billiard table, or what is the condition of it as you found it to be?

A. It is not level like a billiard table, but it is uniform.

Q. And are there any depressions of any size in there, any ditches or drains or holes or things of that kind?

A. There is no depressions of any extent. I would not say any depression over two or three inches.

Q. Now, did you take levels at various places along that land?

A. I did.

Q. To get the exact slope, to get the level of the ground?

A. I did.

Q. And in order to do that did you personally look at and inspect the place on which you took the levels?

A. Yes, sir.

Q. And did you personally walk over those places.

A. I did.

Q. Now, have you prepared and is this a blueprint of a map of the cross sections of the north side of the track between Hughes and Rock Street here in Hughestown, Pennsylvania?

A. I believe it is. I can't see it.

[fol. 328] Q. Well, I have got the back to you (handling). That is it, isn't it?

A. Yes, sir.

Q. Now, on that blueprint you show a cross section of the two rails of the track, cross section of the ties, and you show the slope downward, do you not?

A. Yes, sir.

Q. Now just for the identification purposes, will you tell us where these various levels were taken, and what they purport to show?

A. This first section is taken along——

Mr. Kiendl: May I say that the witness is referring to the section to the left and to the top of this blueprint.

The Witness: At station 11.70.

Q. Station 11.70 means nothing to me or any of these jurors. What is it?

A. That section is taken at the north edge of Rock Street.

Q. At the north edge of Rock Street?

A. Yes.

Q. Now, what is the next one coming down from the first one?

A. That is taken along the culvert and ditch.

Q. The ditch we were just talking about and the depth of which I just asked you?

A. Yes, sir.

Q. Now the next one?

A. That is taken 3 feet further north of the ditch.

Q. And the next one?

A. That is taken 25 feet further north of the ditch.

Q. And the ones on the right side?

A. Well, that would be taken about 65 feet north of the ditch.

Q. And the next one?

A. That is about 95 feet north of the ditch.

Q. And the next one?

A. That is about 135 feet north of the ditch.

[fol. 329] Q. Then do I understand, Mr. Rose, that these cross sections you have taken show the territory, the ground line, from the rails down toward the fence at various points beginning from Rock Street and going north up to Hughes Street?

A. Yes, sir.

Mr. Kiendl: I offer this blueprint in evidence.

Mr. Hunt: I have no objection.

(Marked Defendant's Exhibit I.)

Mr. Kiendl: You may examine, Mr. Hunt. I will just show this to the jury so that they will get a little better idea of what we are talking about. (Showing Exhibit I to jury.)

Cross-examination.

By Mr. Hunt:

Q. Mr. Rose, you have been with the railroad how many years?

A. About 18 years.

Q. You have been in court frequently, I assume?

A. Yes, sir.

Q. You are the man that is called in on court matters, are you?

A. Yes, sir.

Q. Now, you were asked to characterize the curve, as to whether it was small, large or medium?

A. Yes.

Q. Well now, in characterizing the curve, we can get a fairly accurate conception of what that curve was, although we haven't a picture showing it, but by just looking into the picture and watching the line of the telephone poles, can we?

A. Yes, to a certain extent.

Q. Fairly accurate?

A. Yes.

Q. So that what you might call a medium curve some- [fol. 330] body else might think is a large curve? You know what I mean; that is a matter of opinion?

A. Yes.

Q. Now, I say if we take these different pictures and just follow the line of telephone poles here that we see in the pictures, we have got a fairly accurate conception of it, correct?

A. Yes.

Q. Now I will show you a picture taken further back, Mr. Rose,—I will first show you the first picture we see here. You can follow the poles around, and that makes it look like a very decided curve, doesn't it?

A. Yes.

Q. Now to be fair about it, then, you take a picture taken farther back and the poles does not look to turn so abruptly?

A. You mean farther back where?

Q. Further to the—

A. South?

Q. To the south; you can look at it (handing); I say it doesn't look so sharp from that angle.

A. I would say it did.

Q. Well, all right. Either one of them fairly represents it?

A. Yes, sir.

Mr. Hunt: I will put this little picture in evidence.

Mr. Kiendl: Let me see it, Mr. Hunt. (Examining picture.) I have no objection.

(Marked Plaintiff's Exhibit No. 6.)

Q. Now, Mr. Rose, in regard to the next part of your testimony, whatever you saw at any time that you were

ever there, you don't wish to add anything to what any layman can see right here in this picture?

[fol. 331] Mr. Kiendl: I object to the form of that question whether he wishes to add anything to what a layman can see.

Mr. Hunt: Let me finish the question.

Q. (Continuing) Except as to the depth of the ditch. Of course you can't see that here from this angle.

The Court: Change the form of the question, if you will.

Q. Do you wish to add anything to this part of that terrain except what we see right here in this picture? I refer to the cinders and that much of the ditch as you can see and the difference in the—and the other details, and the embankment; do you wish to add anything to what is seen right there?

A. No, sir.

Q. Now then, in regard to the condition lying between the stanchion, the upright stanchion on which the crossing sign is on the railroad track, I presume you saw the tracks of the automobiles that have been going through there, did you?

A. Yes, sir.

Q. And I presume you noticed, while you were there, that they gradually tapered off towards Hughes Street farther and farther from the track? Do you notice that?

A. Yes, sir.

Q. And you see if an automobile ever got down over this ledge here it would in all probability, where I am pointing now, if it ever got there, it in all probability would tip right over, would it not?

A. I would not say so.

Q. Well, it would be very likely to; would you go that far, Mr. Rose?

A. No, I could not.

Q. You could not go that far?

A. No.

[fol. 332] Mr. Kiendl: What point are you pointing to?

Mr. Hunt: I am pointing to some car right directly in back of the upright stanchion, is that correct?

The Witness: Yes.

Mr. Kiendl: Up near Rock Street?
Mr. Hunt: Yes.

Q. In other words, you think an automobile could ride on the part that I am showing you here?
A. Yes, sir.
Q. Pointing to the same place, an automobile could ride half way up that bank going towards Rock Street, could it, without tipping over?
A. Yes, sir.
Q. Now, I suppose when you went there you were not asked by Mr. Kiendl anything about the paths, were you? You were not asked just now by Mr. Kiendl anything about the paths?
A. No, sir.
Q. Well, will you look at that photograph—will you look at it?
A. I have.
Q. After you get beyond the entrance, if we call that the entrance, that is the place where the stanchion is and the tracks and after the road departs off towards Rock Street, did you see the path, there, and exactly the same as you see it there in that little picture? Did you or not, please?
A. I don't just get your question.
Q. Did you see that path that is shown here in the picture?
A. I saw several paths.

Mr. Hunt: That is all, sir.

[fol. 333] Redirect examination.

By Mr. Kiendl:

Q. Mr. Rose, is the cross section that you show on your exhibit which has just been offered in evidence,—does that show whether or not the land below the railroad track is more level up against the ties or more level as you go down? Do you know what I mean?
A. Well, different sections vary, of course.
Q. But substantially?
A. It has a slope down.
Q. It has a slope down beginning right from the ties, hasn't it?
A. Yes, sir.

Q. As shown in these sections?
A. Yes, sir.
Q. But the slope is more pronounced as you get farther away from the track, isn't that so?
A. Yes, sir.

Mr. Kiendl: That is all.

FRANK KELLER, called as a witness on behalf of the defendant, being duly sworn, testified as follows:

Direct examination.

By Mr. Kiendl:

Q. Mr. Keller, you are a railroad conductor, aren't you?
A. Yes, sir.
Q. And have been most of your life?
A. Yes, sir.
Q. Working for the Erie Railroad Company?
A. Yes, sir.
Q. How long have you been a conductor in the employ of the Erie Railroad Company?
A. 33 years.
[fol. 334] Q. And during those 33 years did you spend any part of your time on that portion of the Wyoming Division that runs from Avoca down to Plains Junction?
A. Yes, sir.
Q. How long, about?
A. From Avoca to Plains Junction?
Q. Yes.
A. About 33 years, from Avoca to Plains Junction.
Q. And have you, as conductor, had charge of freight trains?
A. Yes, sir.
Q. Running from Avoca to Plains Junction?
A. Yes, sir.
Q. And from Plains Junction on to the Ashley yard of the Central Railroad Company of New Jersey?
A. Yes, sir.
Q. And have you been over that territory as such conductor by day and by night?
A. Yes, sir.
Q. Were you the conductor on this Erie train which we

call here the Ashley Special that left Avoca a certain time on the night of July 27, 1934?

A. I was.

Q. And what did your train consist of, Mr. Keller, how many brakemen with you in it?

A. The train.

Q. How many brakemen were in the train crew?

A. Three.

Q. And they are all here in court, are they not?

A. Yes, sir.

Q. And in addition to the three brakemen you had an engineer and fireman, of course?

A. Yes, sir.

Q. Six railroad men on your train?

A. Yes, sir, six on the crew.

Q. When did that train leave Avoca?

A. 2:10 a. m.

[fol. 335] Q. And is it part of your duty as conductor to keep a record of the time when a train leaves a certain point?

A. I do, yes, sir.

Q. And did you keep such a record of this train?

A. I did.

Q. Now, when that train left Avoca was it or was it not part of your duties to maintain a train list of the cars in that train?

A. Yes, sir.

Q. And when the train was made up and ready to depart, were such things as waybills given to you as the conductor of the train?

A. Yes, sir.

Q. Will you tell the Court and jury what these waybills are?

A. Why, they are a bill, some are manifest bills, some are card waybills. The manifest bill has the car number, the initial and the contents and the destination, such as the consignee and consignor and the like of that is on the waybills.

Q. And did you as conductor in charge of the train departing from Avoca have such a waybill for each car in your train?

A. Each car in the train.

Q. Are you duty-bound to check those card waybills

against the train to see that you have all the cars in the train for which you have waybills?

A. Yes, sir.

Q. And did you do that on the night in question before this train left Avoca?

A. I did.

Q. And did you then or with someone else prepare a train list of the cars in this train?

Mr. Hunt: I object to the form of that question.

Mr. Kiendl: I will withdraw it.

Q. Was a train list prepared?

A. Yes, sir.

[fol. 336] Q. And a train list prepared for freight trains in the regular and usual course of duty and performance of duties?

A. Yes, sir.

Q. I show you Defendant's Exhibit F. Is that the train list of this particular train?

A. That is the one.

Q. Is that in your handwriting, Mr. Keller?

A. That is not in my writing, that is my flagman.

Q. And what is his name?

A. Jimmie Dooner.

Q. And what did you have to do with the preparation of that train list, if anything?

A. Nothing, only to see that I had bills and the like of that for the train.

Q. Was that one of the regular jobs of your flagman, to prepare the train list?

A. Yes, sir.

Q. Did he check it with you against the bills, or did he not?

A. Not the train list.

Q. Oh, he did not?

A. Not the train list.

Q. Before the train departed did you have anything to do as conductor to see what condition the train was in?

A. Yes, I had to check it.

Q. You had to check it, and I would like you to tell the Court and jury what, if anything, you did about checking it?

A. Well, when the train came in it consisted of 35 cars, that is the train coming in from Susquehanna, and we picked up three cars. When our engine came up at the

other end of our yard she would be about a half mile from where this train came in. When I got the waybills for the train the flag man took the train book and I took the bills while the engine and the two brakemen were pushing three more cars on the rear end of the train. We checked from the rear end to the head end, and he put the number and initials in his book, and I gave him the contents and the destination as we passed up the train, so we went from the rear end of the train right to the head car.

[fol. 337] Q. Were you both on the same side of the train?

A. Both on the same side, yes, sir.

Q. And as you went along there you checked by looking at the car doors, the car numbers and so on?

A. Yes, sir, we looked at the car number and initial and also looked to see that the doors were closed or if there was anything dragging along or if there was anything projecting from the train; if we had open cars, to see that they were properly loaded, that they were not high where anything could roll off and injure anybody or that they were not shifted or that there was no bulged sides of cars where there would be danger of anything falling out, and such as that.

Q. Now, when you and your flagman did that on one side of the train from the back to the front end of it, did you do that on the other side too?

A. No, we did not, just the one side.

Q. And which side of the train was that, the right side as the train went out, or the left side?

A. The westerly side.

Q. Well, as the train went forward, would that be on the right side?

A. The right side, yes, sir.

Q. The right side of the train?

A. Yes, sir.

Q. And did you find anything wrong?

A. Nothing.

Q. On that side of the train when you checked it?

A. No, sir.

Q. And your flagman went along checking it?

A. Yes, sir.

Q. You mean for yourself that you did not find anything wrong, I take it?

A. No, we didn't find nothing wrong.

Q. Now, do you know, Mr. Keller, whether the train

list is kept with the cars in the order in which they were in the train as it departed from Avoca?

[fol. 338] A. The way the cars were in the train, yes, sir, I do.

Q. The train list has the cars all numbered from 1 to 38 on the left side of your train list?

A. Yes, sir.

Q. Would car No. 1 be the car next to the engine?

A. On the slip, yes, sir, it will.

Q. And does that train slip show the car numbers in the order in which they were actually in this train when it left Avoca?

A. Yes, sir.

Q. The train left at 2:10 a. m., I think you have already told us.

A. Yes, sir.

Q. Where did it stop first, if it stopped at all?

A. The first stop was at William Street, Pittston. That was in Pittston.

Q. Now, is William Street beyond Rock Street as the train was proceeding?

A. Yes, sir, it is.

Q. Did your train make any stop of any kind between the time it left the yard at Avoca until after it passed over Rock Street crossing in Hughestown?

A. No, sir.

Q. It continued on to William Street in Pittston?

A. Yes, sir.

Q. And stopped there for what purpose?

A. It is a road crossing that you have to flag, you have to stop and put a brakeman off there to protect the crossing while you are going over it.

Q. And then on signal I suppose the train started up again?

A. Yes, sir.

Q. And did it have, on its way down to Ashley, a few more stops for that same purpose of flagging a crossing?

A. Yes, sir.

Q. Now, when did the train arrive in Ashley on the morning of July 27, 1934, if it did arrive there that morning?

A. I believe it was 4:40.

Q. And you made a record of that, didn't you?

A. I did.

[fol. 339] The Court: 4.40 a. m.?
The Witness: 4.40 a. m.

Q. How far is Ashley from Avoca, about?
A. I would say 16 miles, or probably a trifle more.
Q. You left Avoca at 2.10 and arrived at Ashley two hours and a half after leaving Avoca?
A. Yes, sir.
Q. And that is a distance of about 16 miles?
A. About 16 miles. It may be a quarter of a mile further, and it may not.
Q. Such detentions as you have in your operation of freight trains, do you keep records of those for the Railroad Company?
A. I do.
Q. Did you keep such a detention report on the night in question of this particular train?
A. I did.
Q. And is this the original of it (handing)?
A. Yes.
Q. Is that in your handwriting?
A. Yes, sir.
Q. Outside of the mimeograph printing on it?
A. Yes, sir.

Mr. Kiendl: I offer it in evidence.
Mr. Hunt: May I see it, please.
Mr. Kiendl: Yes (handing).
Mr. Hunt: What do you call this Mr. Kiendl:
Mr. Kiendl: The detention report. I don't know whether that is artistic, railroad-wise, but that is what I call it.
Mr. Hunt: No objection.

(Marked Defendant's Exhibit J.)

Q. Now, this detention report is dated July 27, 1934, and [fol. 340] shows your engine number, your engineer's name, your name as conductor?
A. Yes, sir.
Q. It shows the departure and arrival at various points on that trip, does it not?
A. Yes, sir.
Q. And it shows the arrival at Ashley at 4.40 a. m.?
A. Yes, sir.
Q. Now I call your attention to the fact, Mr. Keller, that

[fol. 347] AFTERNOON SESSION

FRANK KELLER, resumes the stand:

Cross-examination.

By Mr. Hunt:

Q. Now, Mr. Witness, you were supposed to leave Avoca at what time?

A. 2.10.

Q. What was your usual time that you left Avoca?

A. Usual time?

Q. Usual time that that train left Avoca.

A. 2.10 was the time that we left.

Q. You didn't usually leave Avoca at 1.30?

A. No. We have no regular time. Sometimes our train is late, but we leave over two hours late.

Q. Were you delayed at Avoca this night?

A. Yes, sir.

Q. You were delayed there 40 minutes?

A. Yes, sir.

Q. By reason of what?

A. Waiting for the South Ashley to get in.

Q. Otherwise you would have left at 1.30?

A. Approximately 1.30.

Q. Now, was there certain switching done there in Avoca before you started out?

A. Yes, we took three cars.

Q. And that train arrived—the major part of the train arrived at Avoca at about what time?

A. Oh, probably about 1.40.

Q. You were delayed at Avoca 40 minutes, so it must have arrived before 1.30, didn't it?

A. About 1.40.

Q. And part of this train came up from where?

A. Avoca. The train that came in, you mean?

[fol. 348] Q. The train came in and you took part of that train out and added some other cars, did you?

A. Yes, we took the whole train and added three cars on to it.

Q. The train came in at what time?

A. About 1.40.

Q. You said you would have left—you were held up at

Avoca 40 minutes because of something, some southbound train?

A. Yes.

Q. You said if you had not been held up 40 minutes you would have left Avoca at 1.30, didn't you?

A. Yes; we would have left 1.40, or probably before.

Q. Well, it didn't get there, the train you took out didn't get there, or the major part of it didn't get there until 1.40, you say?

A. Certainly not; that is what caused the delay.

Q. That is what you were waiting for?

A. That is what we were waiting for.

Q. And when it got there, it got there at what time?

A. About 1.40.

Q. What is this delay of 40 minutes, is that because it wasn't there?

A. Because it wasn't there.

Q. Now, how long after it got there—there was no occasion for any further delay after it arrived there, was there?

A. Oh, yes.

Q. What?

A. We had to check our train and such as that.

Q. Now, how long did it take you to check the train?

A. Possibly 30 minutes.

Q. What are these other delays that you have listed on this paper that Mr. Kiendl called attention to, that he calls the detention slip?

A. What other delays?

Q. I don't know; read them to me.

A. There is 40 minutes for South Ashley, that is at CA, Avoca; KV is Miners Mills.

[fol. 349] Q. Yes.

A. One hour blocked off. Ashley——

Q. Yes.

A. 10 minutes leaving cars; 15 minutes taking on cars; 5 minutes testing air; 5 minutes taking water. That is in Ashley yards.

Q. So you spent five minutes testing air and five minutes taking on water?

A. Yes, sir.

Q. And some time after it got in there and you got ready to go, you and one of the brakemen took and walked along the side of the train?

Mr. Kiendl: At Ashley?

Q. Some place; at Avoca, did you not?

A. Yes, when the train pulled into Avoca.

Q. When the train pulled into Avoca. That is when you took the walk?

A. That is when we checked up the train.

Q. And are you handed anything from the conductor that comes in on that train?

A. We are handed the waybills.

Q. Are you handed any train sheet?

A. No, sir.

Q. The train sheet—there is a train sheet for that train that came into Avoca, was there not?

A. There is what?

Q. There is a train sheet, is there not, somewhere?

A. From Susquehanna to Avoca they leave one there at Avoca, yes, for the train coming in.

Q. There is a train sheet of the train that you took out of Avoca except for the three cars?

A. Yes, sir.

Q. That train sheet, of course, is on file with the company?

A. Yes.

Q. That is not the train sheet that is in evidence here?

A. No, not the one we had, no.

Q. And then when you and your brakeman started to take that walk, you started from the rear end of the train, [fol. 350] if your recollection is correct?

A. Yes, sir.

Q. Your whole testimony, did I understand, Mr. Keller, amounts to telling us what you usually do, how you usually do it. Do you remember this particular night? Yes or no?

A. I remember the particular night.

Q. Well, what did you do—do you make this run every night?

A. Yes, sir.

Q. What did you do the night before when the train came in?

A. Possibly the same thing.

Q. And the night before that?

A. Possibly the same thing.

Q. And so on?

A. The same work probably every night.

Q. So you are really telling us what you usually did?

A. Yes, sir.

Q. And as you went along the train there is no doubt that at one end of that train there was car 3113, is that correct?

A. Yes, sir.

Q. And you started like all railroad men, you started either from the front or the rear, didn't you?

A. Start in at the rear end, we generally do, checking up a train, because the train pulls up and I have to wait for the caboose to get my bills.

Q. Yes; so you usually start at the rear end?

A. Yes, sir.

Q. And you don't go up along the twenty-sixth car or anything like that and start in, do you?

A. No.

Q. And you went along one side of this car?

A. Yes, sir.

Mr. Kiendl: Train.

Q. Train. And you made notations of the numbers of the cars, did you?

A. Yes, sir.

[fol. 351] Q. And you would know the contents of the cars, would you, also?

A. Yes, sir.

Q. You said you looked at the doors as you went along?

A. Yes, sir.

Q. Your inspection was, if it was an inspection, took place at night time, did it?

A. It took place in the night, in the morning, yes.

Q. Well, I mean it was dark; that is what I am trying to get at.

A. Yes, sir.

Q. And you had a light?

A. Yes, sir.

Q. Of some kind?

A. Yes.

Q. What kind of a light was it?

A. Kerosene lantern.

Q. The old-fashioned lantern we know of, that runs with a kerosene wick?

A. A small railroad lantern.

Q. Who carried that, you or the brakeman?

A. We each had one.

in the train slip the time of arrival at Ashley is given as 3.56 a. m. Do you see that?

A. I do.

Q. That is written by your flagman on that?

A. Yes, sir.

Q. And is that written at the time the train list is made up at Avoca?

A. Yes, sir. We generally get in Ashley around an hour and forty-five minutes.

Q. I see.

A. Or two hours; and when we leave Avoca he figured that length of time.

Mr. Hunt: Oh, just a minute. I object to any——

The Witness: He figured that length of time we would arrive in Ashley, and he marked that.

Q. Of course you can't give that, he will have to give that himself, but I call that fact to your attention. Now, Ashley you have "Arrived Ashley 4.40."

A. That is our real time.

Q. Now, you have on this detention report "Delays." Do you see that?

A. Yes, I know what that is.

Q. Against that you have written in your own handwriting—what is that, CA?

A. "CA" is Avoca.

Q. Then you have got "40M." Does that mean 40 minutes?

A. 40 minutes.

[fol. 341] Q. "For South Ashley KV."

A. That is Miners Mills.

Q. Miners Mills "one hour," is that right?

A. That is right, one hour.

Q. "Blocked off"—"One hour blocked off."

A. Yes.

Q. "By," is that right?

A. No "blocked off one hour with a train."

Q. I see.

A. That was standing on the main line where we come out on the main line, there was a train standing there and we could not get by, and we were blocked at Miners Mills one hour.

Q. By a Central Railroad of New Jersey train?
A. By a Central Railroad of New Jersey train, yes.
Q. Now you have got "AY," that is Ashley, isn't it?
A. That is Ashley.
Q. "10 minutes."
A. 10 minutes.
Q. "Leaving cars."
A. Leaving cars.
Q. "15 minutes."
A. Yes, 15 minutes.
Q. "Taking on."
A. Taking on cars.
Q. Then what is this 5 minutes.
A. 5 minutes.
Q. "Testing air."
A. Testing air.
Q. "5 minutes taking water."
A. That is right.

Q. So the only detentions you have in your detention report from Avoca to Ashley are the 40 minutes you waited for your train to be made up at Avoca and your one hour at Miners Mills where the Central Railroad freight train blocked you out?

A. Yes, sir, that is all the delay we had.

Q. Now, in addition to the one hour delay leaving at 2.10, the only delay you had outside of flagging these crossings that you flagged, was this one hour stop at Miners Mills?

A. Yes, sir.

Q. And that is on the Central Railroad of New Jersey tracks, isn't it?

A. That is on the Central Railroad of New Jersey tracks.

[fol. 342] Q. About how long in all, would you say, it took you to flag the crossings that you had flagged all the way down through these 16 miles, were there four of them, six, eight, ten or what?

A. There is three that we have, from the time the caboose stops until it is moving again it would be a minute or less.

Q. And taking off your hour's delay, the fact is that the running time for these 16 miles was close to an hour and a half that night.

A. Yes, sir.

Q. And on the way from Avoca to Rock Street, do you know whether the tracks are up-grade or on the level or down-grade?

A. They are up-grade.

Q. On that trip did you learn of the occurrence of any accident at or near Rock Street in Hughestown?

A. Not until I got back from Ashley to Avoca.

Q. When you got back to Avoca?

A. Yes, the next morning; the next morning when I got back to Avoca.

Q. Did you then get a report that somebody had been hurt near the Rock Street crossing?

A. Well, one of our Erie police showed me a paper, the Scranton Republican, where a man at Rock Street lost his arm.

The Court: What time did you get back? You say when you got back. When you got back to where?

The Witness: Avoca.

The Court: What time was that?

The Witness: I can't tell now without—it is on that train report there, the time we arrived back at Avoca.

[fol. 343] Q. "Arrived at Avoca 6.45 a. m."

The Court: The same day?

The Witness: The same day, yes, sir.

Q. When that was called to your attention the next morning you recalled making this trip the night before from Avoca to Ashley?

A. Yes, sir.

Q. Do you recall at about what rate or speed your train proceeded from Avoca to Rock Street?

A. We could not go any faster——

Q. Not what you could not do. What you did do.

A. I would say about 8 to 10 miles an hour.

Q. And did that continue until you got beyond Rock Street?

A. Yes, it continued until the engine had passed over Rock Street.

Q. And some place beyond Rock Street you come to a point where there is a down-grade?

A. Yes, sir.

Q. Is that right?

A. Yes, sir.

Q. Now, when you approached Rock Street where were you?

A. I was in the caboose.

Q. And were two of your men there with you?

A. There was two men in there with me.

Q. And were the other men, so far as you know? They were all up in the locomotive, weren't they?

A. All the brakemen.

Q. The head brakeman and the engineer and the fireman?

A. They were in the engine.

Q. Now, did you remember the next morning, when your attention was called to the fact that someone had been hurt in that particular locality, whether or not the engineer blew a whistle for the Rock Street crossing?

A. Yes, sir.

Q. Did you hear it in your caboose?

A. Yes, sir, I could hear the whistle in the caboose.

[fol. 344] Q. 38 cars behind the locomotive?

A. Yes, sir.

Q. Do you remember and can you tell us whether or not the bell on the locomotive was ringing as that train approached Rock Street?

A. I could not hear the bell, that is too far, and the engine was making too much noise pulling the train up, you could not hear a bell back there.

Q. You could not tell in the caboose whether or not the locomotive headlight was lit?

A. Not from the caboose.

Q. Did anybody report to you as the conductor in charge of that train, at any time, that there was anything wrong with any part of it?

Mr. Hunt: I object to that as incompetent, irrelevant and immaterial.

The Court: Objection overruled.

Mr. Hunt: Exception.

A. No, sir.

Q. You have been a conductor for how many years?

A. 33 years.

Q. Have you seen freight car doors, during those 33 years, almost every day of your life?

A. Oh, yes.

Q. And you are familiar with those that run on runners at the bottom of the door, are you not?

A. Yes, sir.

Q. And are you familiar with those that open outward on the refrigerator cars?

A. Yes, sir.

Q. And those are the two types of doors on freight cars generally, isn't that right?

A. That is right, those are the two, yes.

Q. How long has it been, if ever there was an occasion, when you as a conductor saw one of those sliding doors on runners that came off the track so that the door would be able to swing outward?

[fol. 345] Mr. Hunt: I object to that as not part of the cross-examination.

Mr. Kiendl: It is not intended to be cross-examination.

Mr. Hunt: Not part of the direct examination.

The Court: Objection overruled.

A. Yes, I have seen it.

Q. Did you see that frequently or occasionally?

A. No, very seldom.

Q. When is the last time that you recall having seen one, Mr. Keller?

A. Oh, I don't remember; maybe seven, eight, ten years ago; I could not say.

Q. You could not say exactly, but give us your best impression.

A. Seven, eight or ten years ago.

Q. It has been, according to your best impression, seven or eight to ten years ago, since you have seen one of these sliding doors of a freight car that was off the rail at the bottom and swinging?

A. Yes, sir.

Q. Now, how about the doors on the reefers; have you seen those swinging at any time that you recall recently?

A. I have seen them, but not recently.

Q. Well, about how long has it been since that occurred, that you remember?

A. Oh, five, six or seven years.

Q. Five, six or seven years?

A. Yes, sir.

Mr. Kiendl: Well, it is not particularly funny, is it, Mr. Hunt?

Mr. Hunt: I didn't smile at all, and I didn't laugh. That was Mr. Walsh.

Q. You are familiar with the sealing system for doors [fol. 346] of freight cars, aren't you, that the railroads of this country generally employ?

A. Yes.

Q. Now, if a door is swinging open, the seals can't possibly be intact, can they, and would have to be broken, isn't that so?

A. If they are open?

Q. No; maybe I am confusing you. A car door that is closed and has a seal applied to it, that is one with a lead and a number on it, that door cannot be opened without breaking that seal, can it?

A. Not without breaking the seal, no, sir.

Q. And that is true of all freight cars,—reefers, box cars and every freight car that has doors that are sealed, isn't that so?

A. Loaded cars, yes; empty cars are different.

Q. Well, empty cars would not have seals on?

A. No.

Q. But if they had seals on, then to open the door of an empty car you would have to break the seal to enter the car, wouldn't you?

A. Yes, sir.

Mr. Kiendl: You may inquire.

The Court: It is ten minutes to one. You will probably take more than ten minutes.

Mr. Hunt: Yes, your Honor. I will probably take more than ten minutes.

The Court: All right. We will take a recess, gentlemen. You are not to discuss this case among yourselves or with others. Be back at two o'clock.

(Recess until two o'clock p. m.)

Q. You can tell us, you know about the claims of the different railroads against each other about when a car is sealed and when it is not sealed at a given point, don't you?

A. Yes, I have heard of claims.

Q. And the question always is as to whether, at a given point, a car was sealed properly, do you understand?

A. Yes.

Q. Now, you know that little wire that goes around in there some way?

A. Yes, I know the seal.

Q. How do you fix that on a reefer door? Where do you put that wire on a reefer door?

A. Where you latch it, and it would go on a box car between the doors.

Q. On the reefer door it is just a little piece of steel that slips down into a groove, isn't it, looking at these pictures?

A. No.

[fol. 361] Q. It is not?

A. No.

Q. Is there any hole in the latch there?

A. Yes.

Q. And you put a piece of wire through?

A. Yes, put the steel down through it.

Q. I want to get at what this seal is. This seal, is a piece of wire or—it is a little thin piece of tin, is it not?

A. It is a good hard piece of tin that they put down through it.

Q. They don't use wire?

A. About the only wire one I ever see now, a wire seal, comes, I don't know, in some western or some Government seal.

Q. Do you know anything about this practice, or have you ever seen it, this practice, that doors are left open or doors have been open and the seal is left off there at the latch, hanging over at the latch, to give the inspector the impression that it is sealed when actually it is not? Do you know anything about that?

A. Where seals have been broken?

Q. In other words where seals have been broken, the wire and the little piece of steel or tin is left right hanging?

A. That may occur.

Q. Well, you know it. Now, what I am getting at, you know all about that?

A. I have seen it.

Q. Yes, you have seen that many times, haven't you?

A. Not so many times, but I have seen it, yes.

Q. That is done purposely, the remains of that seal is left up there, because you know the inspector doesn't get up and fool around the steel to see whether it is sealed or not?

Mr. Kiendl: I object to that, if your Honor please. How can this witness possibly know that?

Q. Well, you know the inspector doesn't get up and pull [fol. 362] on each piece of wire to see that it is where it belongs; you know that he doesn't do any such thing as that?

A. Not the car inspector.

Q. You know that?

Mr. Kiendl: Let him finish the answer.

The Witness: I say a car inspector don't, no.

Q. You have been a railroad man for 30 years and more, haven't you, and don't know that?

A. Don't know what?

Q. Whether an inspector gets up and pulls on a wire to see whether it is in proper place or not.

A. No, a car inspector don't; they know.

Q. And the contents of the fourth car on this list made up when you arrived at Ashley was what?

Mr. Kiendl: There is no list when he arrived at Ashley, as you know, Mr. Hunt.

Mr. Hunt: I didn't say when he arrived. I say the list you had.

The Witness: I don't know that I can tell. That is not on the——

Q. All right. This is your train list, is it not?

A. Yes.

Q. The number of the fourth car on this list is what?

A. I don't know.

Mr. Kiendl: Well, which list are you referring to, Mr. Hunt? May we have that definite for the purpose of this record?

Mr. Hunt: I say the list made up at Ashley.

Mr. Kiendl: By whom?

[fol. 363] Mr. Hunt: I mean the seal record.

Mr. Kiendl: Oh, that is the one.

Q. And that number is what?
A. 26643.
Q. And what is that, do you know what those initials stand for?
A. Yes, sir, URC.
Q. What does that mean?
A. Union Refrigerator.
Q. Union Refrigerator Company 26643?
A. Yes, sir.
Q. That is an Erie car, is it not?

Mr. Kiendl: It is a Union Refrigerator car.

Q. What is this car here?
A. That is an Erie seal.
Q. The word "Erie" here right after the number.
A. That is the seal.

Mr. Hunt: You see the reason I said that, Mr. Kiendl, the word "Erie" is spelled right after it.
Mr. Kiendl: Yes, showing an Erie seal was on that car.

Q. And that number is 26643?
A. Yes.
Q. Now, find that and see if you can find it very quickly.
A. Here it is.
Q. That is the same car, is it?
A. Yes, sir.
Q. And that car was loaded with what?
A. Grape juice.
Q. And that grape juice came from where, do you know, sir.
A. I don't know where it came from, no.
Q. The Erie Railroad would know, wouldn't it?
A. Yes, they could find out where it came from. I don't [fol. 364] know where that came from. All I have is the destination where they go.

Mr. Hunt: Thank you, sir.

Redirect examination.

By Mr. Kiendl:

Q. Mr. Hunt asked you, Mr. Keller, whether or not the car inspectors tested the seals on the car doors where they were sealed.

Q. And did you inspect any of the hand-grabs or—you had nothing to do with that?

A. Handbrakes?

Q. Yes.

A. No, no, we didn't do any of that kind of stuff.

Q. You were getting the train list of the cars you had on your train, and the contents, were you?

A. Yes; we were putting them in the book at the time.

Q. But you have come here, you realize, to assure these gentlemen that you also were looking out for doors.

A. I did when I checked up; that is part of my duty.

Q. That was part of the purpose in taking this check, wasn't it?

A. No, we took the ordinary—we were checking the train, and we do that while we are doing that, we look over the different parts of the cars to see if they are safe to run and properly loaded.

[fol. 352] Q. And you did that up one side of this train, and you knew it was important, as conductor of the train, to see if these doors were actually sealed and actually closed, didn't you? You knew that was important?

A. Yes, sir, the side I go up on I always do.

Q. As an old railroad man you know from your experience the danger in case either a door is off the rail or if one of them is either opened or closed without being latched? There are three dangerous conditions that you are familiar with, aren't you?

A. Yes, sir.

Q. So you looked along to see if they were latched and closed, did you?

A. To see that they were closed as I went by.

Q. And then your work was over, as far as that job was concerned?

A. What do you mean?

Q. I mean you had completed your work?

A. Yes, we had completed.

Q. So far as going over the train was concerned?

A. So far as going over the train was concerned.

Q. Now then, did you think that it was more dangerous to have a door off a rail or to have it open or to have it closed and unlatched—did you think that that was more dangerous if that condition happened on one side than on the other side of that train? Did you or did you not?

A. It would be just the same.

Q. It would be just the same on one side as the other?

A. Yes.

Q. But you did nothing so far as one side of that train was concerned, correct?

A. Not for me.

Q. Yes.

A. We had a car inspector.

Q. That is what I am asking you about, yourself.

A. All right.

Q. And so what I am geting at, as you wal. .d along there, [fol. 353] the plain fact of the matter is that you didn't have in mind any doors or whether they were closed or latched or anything of that kind, did you?

A. Oh, yes, I did.

Q. You thought it was important?

A. Certainly I thought it was important.

Q. Well then, just explain to these gentlemen why don't you go up the other side of the train, if you thought it was important, to see what the condition was over there?

A. Because there were car inspectors to do that.

Q. That is just my point, sir.

A. I am not supposed to walk around the train. My duty, when I am passing by the train, is to see whether it is closed on that side.

Q. You are not supposed to do that at all, are you?

A. What?

Q. Look at these doors and see their condition; that is not part of your work?

A. Yes I am, when I am passing up, certainly, when I am passing by them; and always do.

Q. And the doors were all right the night before, were they?

A. Yes, they were all right the night before.

Q. And they were all right the night before that?

A. So far as I know, yes.

Q. They had been all right for years?

A. They had been all right right along, they had been closed.

Q. They had been all right for the few years, seven or eight, I think you told me.

A. How many?

Q. Seven or eight, didn't you say before lunch?

A. Yes, since—five, six, seven or eight years since I saw them swinging a door off the rail.

Q. Before lunch, and if I am in error, you correct me, before lunch you said there was one kind of a door you had not seen swinging for about seven or eight years.

A. Yes; that was a box car.

Q. And there was another kind of a door that you said [fol. 354] it had been five or six years; do you remember that testimony you gave?

A. Yes, sir.

Q. Now then, seven or eight years ago, you saw a door of a box car off the runner, did you?

A. Yes, I have seen them off the runner.

Q. You saw them off the runners all right up until about seven or eight years ago?

A. I don't know whether it was seven or eight years. I said seven or eight, and it is that long since I saw one.

Q. I say up until seven or eight years ago you saw——

A. No, I haven't saw them.

Q. What is that?

A. I haven't saw them off.

Q. For the last seven or eight years?

A. Yes.

Q. Up to that time you frequently or occasionally had seen them off the runner?

A. Yes, occasionally.

Q. And up until five or six years ago you had occasionally seen reefer doors open as you passed by, but you haven't seen any for the last five or six years?

A. No, sir.

Q. Does that fairly put your testimony here?

A. That is true.

Q. Now, they are using the same kind of box cars on the Erie on this branch of the Erie that they used 20 years ago, are they not?

A. Yes, they are built the same; they are larger than they were 20 years ago.

Q. Well now, let's see. You have got your wooden box cars running right there today that you know, if you will speak up, that of your own knowledge had been in use, they have actually been in use for over 20 years; don't you know that?

A. No, I could not say that.

Q. Well, you have been with the road over 30 years?

A. Yes. They are rebuilt. They are built larger.

Q. Oh, you mean they are heavier?

A. They are built larger.

[fol. 355] Q. I am not talking about your new cars. Just leave those out. You see railroad trains pass you every day, do you not?

A. Yes, sir.

Q. And you know that we gentlemen do too, these counsel see trains go by; you realize that?

A. Yes.

Q. All right. Now tell us—you told us they become damaged, old box cars—how old are they?

A. I don't know.

Q. Well, give us some idea.

A. I could not; I don't know how old they are.

Q. Are they ten years old?

A. Probably.

Q. Are they twenty?

A. I could not say.

Q. Well, are they fifteen?

A. I don't know.

Q. Now the majority of your box cars on that division are the old cars, are they not?

A. No, sir.

Q. Well, 50 per cent of them?

A. No, sir.

Q. What do you call a new car—built how recently?

A. Our new steel cars, all these steel cars and the like of that.

Q. I am not talking about steel cars.

A. Well, steel box cars.

Q. Can you tell me from this list how many of the old wooden cars there are on this list?

A. On that list?

Q. Yes.

A. I don't know that I can tell all of them or not. I can tell some of the wooden cars.

Q. All right, how many old wooden cars are there on that list?

A. I won't say how old they are, whether old or new, but there are wooden cars.

Q. Well, all right.

A. Why, I see six box cars that is wood.

Q. You see six wooden box cars?

A. Yes.

Q. And you haven't any idea of their age?

A. No, I have no idea of their age, no.

Q. Well now, coming back to the seven or eight years ago when you say you occasionally saw the box car doors [fol. 356] off the rail, having jumped the rail—I am not talking about new steel cars now, but old wooden box cars—nowadays your rail and the door and the door construction is exactly the same as it was seven or eight years ago, isn't it?

A. Yes.

Q. Probably they may very well be the same cars, so far as you know, that you saw seven or eight years ago?

A. They may be.

Q. And going back seven or eight years ago, when you found a door had jumped the rail, that would oftentimes happen while the train was in transit, that is going from one place to the other, when it got into where you were to take the train over?

A. Yes.

Q. You would find that the door had jumped the rail in transit?

A. Yes.

The Court: Is there anything in the testimony here regarding a box car jumping the rail as well, the car itself, or is it just the door?

Mr. Hunt: Just the door, your Honor. When I speak of rail, you see the door runs on a little rail—what do you call that, a rail?

The Witness: I don't know the name of it. The car inspectors would have to give the name of that.

Mr. Hunt: What do you call it, a rail?

Mr. Kiendl: Call it a rail for our purposes, or a track.

Mr. Hunt: It is a little steel guide, and possibly I should not use the word rail. That may be a little confusing.

Q. You find that in transit this door—how many wheels are there on the bottom of that door, two?

A. There may be.

[fol. 357] Q. One on either end?

A. There may be one in the center. I never took particular notice.

Q. And that runs on a little steel flange along at the bottom, that is correct, is it not?

A. Something like that.

Q. And that flange is screwed into the wood of these box cars?

A. It is bolted in there in some way.

Q. Screwed in, isn't it?

A. I don't know whether it is screwed in or bolted.

Q. And this wood into which these screws are screwed, that wood is out in all kinds of weather year in and year out, is it not? You don't have any sheds to put your box cars in?

A. No.

Q. They just stand out in the elements the year round? Do you understand me?

A. I do.

Q. Well, speak up, please. We are trying to get through as early as we can this afternoon. Now, sir, let's see if I understand this part correctly. Now, you say when you found, seven or eight years ago, that your door, in transit, had jumped the rail, the simple process of getting that back on the rail would be to slide it back, open it up as far as you could, and then if you push up on it, push up on the door at the bottom, the first wheel will jump over a little projection there, and you push it along until you come to the second wheel and then you push up on your door again and you have got it back on the rail. Am I correct in that, sir?

A. I don't know.

Q. Well, I am trying to take you back seven or eight years ago. You certainly——

A. If that door was not wide open, the door would not swing.

Q. I am asking you, sir, if you will just follow me—do you understand my question?

A. Yes, I understand.

Q. Well now, please! You found, where a train came in [fol. 358] that you had to take out, it came to your attention occasionally, seven or eight years ago, that on these wooden box cars the door has jumped off the rail. Now I am asking you, I want to direct your attention to how you get it back on the rail. Isn't it a fact that you would move the whole door back as far as you could and then there is a certain play, there is a certain play up at the top, and the simple process, you lift that door and push it up and you could get your first wheel back on the rail and then you push

it along until you get the second wheel back on the rail, isn't that the procedure to get it back on the rail?

A. (No answer.)

Q. How do you get it back on the rail, if you don't understand my question?

A. I did not have it in my train. I said I saw one.

Q. Yes.

A. That didn't happen in my train.

Q. And you never put one back on the rail?

A. No.

Q. You never put a door back on the rail?

A. No.

Q. You saw them occasionally?

A. I saw them, I said, I said I saw them, but I did not say that was in my train.

Q. You said you saw them occasionally up until seven or eight years ago?

A. Yes.

Q. Then did you tell me, sir, following that, that on trains that came in that you were to take out—do you remember me asking you that question?

A. No, sir.

Q. You don't remember that?

A. Not about doors being off of the rails.

Q. I did not ask you that, if you had made that observation on trains that came in which you were about to take out, you made the observation that some door in transit, while coming in, in motion had jumped the rail? You don't [fol. 359] remember me asking you that?

A. No, sir, there was nothing asked me about that.

Q. All right, sir.

A. I don't think so.

Q. Now, can you tell me from your experience as a railroad man, Mr. Keller, knowing what you do, you are generally familiar with the construction of a car?

A. Construction?

Q. Yes.

A. No, I don't pay no attention to that.

Q. Don't pay any attention to that?

A. No, I am not a builder, no.

Q. And the reefer doors, occasionally, four or five years ago you occasionally found reefer doors ajar, or you found them closed with the clamp out of position. You said you

have seen them occasionally up to five or six years ago, is that correct?

A. I haven't handled them myself. I have saw them, yes. I have saw them where they were open.

Q. Would you do anything about it if you had nothing to do with that train, or just going away?

A. No, sir, I would close it.

Q. You would close it?

A. Positively.

Q. But you would not seal it?

A. No; I have no seals to seal with.

Q. And the answer is you would close them and not seal them?

A. I would close them and fasten them.

Q. With respect to these doors, the thing you fasten them with is about how high above the ground?

A. Oh, I don't know the distance; probably a little higher than my head. Oh, I would say that high (standing and illustrating).

Q. Just a little higher. Now, just stand back a little so I can see that distance. How tall are you?

A. About five feet ten.

Q. And the latch is about——

A. The latch would be up about that high (indicating).

[fol. 360] Mr. Kiendl: About six feet.

Mr. Hunt: About six feet.

Q. And the latch on a box car door, is that the same distance or higher?

A. No, I believe they are lower than that.

Q. A box car?

A. Yes, they are lower than a reefer. I know I can reach a box car latch easier than I can a reefer.

Q. You can just about reach the reefer door, can you, the latch?

A. No, I have a better reach than reaching the reefer door, but a box car door I don't think it is as high.

Q. You have quite a reach, do I understand, for a reefer door?

A. I tell you about that high when I stand there the way I am standing on this platform here.

Q. Assuming the ground is level?

A. Yes, if the ground is level or near level.

Q. Did you hear the engine bell ringing?

A. No, sir.

Q. You don't know anything about the headlight on the locomotive at that particular time when the train was going over Rock Street, as to whether it was lit or whether the engine was running blind, you don't know?

A. I don't know, sir.

Mr. Kiendl: You may examine.

Cross-examination.

By Mr. Hunt:

Q. You say, sir, that the time that train arrives and leaves is comparatively unimportant?

A. Not on that slip, sir.

Q. And so when it comes to that part of your report you just fill that out and put in an estimate or something?

A. Always estimate it.

Q. And you remember that you did get in at 4. what?

A. 40.

Q. What time did you get into Ashley?

A. 4:40, sir.

Q. And then Mr. Kiendl says how do you remember that and you said that you remembered it because you always asked the conductor.

[fol. 375] Mr. Kiendl: No, he didn't say that.

The Witness: Always asked the conductor what arrival we made.

The Court: He says because the conductor told him.

Q. Didn't you say right afterwards you always ask the conductor?

A. I would ask the conductor, yes, sir.

Q. You always ask the conductor?

A. When I am flagging for him, yes, sir, because I have a wheel report.

Q. And you remember now the reason you got in at 4:40 is because on this night you asked the conductor what time it was and he said 4:40?

A. Yes, sir.

Q. That is right, now?

A. Yes, sir.

A. No, they don't.

Q. Whose job is it to do that?

A. The clerk that checks his train when we arrive in Ashley, he goes around and takes the numbers of the cars, the loaded and empties, and the seal records of every car in the train that is sealed.

Q. And that is what I would call the seal inspector, the clerk that inspects and takes a record of the seals.

A. Yes.

Mr. Kiendl: That is all.

Recross-examination.

By Mr. Hunt:

Q. And you have seen him do his work, have you?

A. Yes, I have seen him do his work.

Q. And what does he do?

A. Who?

Q. This man that Mr. Kiendl referred to.

A. The clerk?

Q. Yes; which end of the train does he usually start at?

A. What is that?

Q. Which end of the train have you usually seen him start at?

A. Oh, he starts wherever it is convenient to him.

Q. Well, what do you mean by convenient?

A. Well, he may be down at the rear end of the train, [fol. 365] maybe 14 or 15 cars, anywhere he is located, and when we come in he will come right across to the train and start around it.

Q. Does he start——

A. He does not have any particular place to start.

Q. And does he start at either end of the train?

A. He can start either end.

Q. He can start at either end?

A. And he can start at the middle of it, or any place.

Q. The middle of it?

A. Any place he wants to start.

Q. You can start anywhere you want to, can't you?

A. Oh, no.

Q. Can't you?

A. No.

Q. Why not?

A. Because I start—well, I start where it is convenient, but that is either the head end or the rear end.

Q. I see, but you could start anywhere you wanted to?

A. No.

Q. Why not?

A. I could not and check a train.

Q. Well, tell us why you could not?

Mr. Kiendl: He said he could not check the train.

A. I would be doing a lot of unnecessary work and unnecessary delay, and doing a lot of unnecessary work for myself.

Q. You know you are doing substantially the same thing he is, going down the list and taking a list of the cars?

A. No, I check my train to keep the bills straight so that when we get the train checked the bills is straight from the engine to the caboose.

Q. Now let me ask you this: You have seen this clerk do his work, have you?

A. I have seen him.

[fol. 366] Q. At night time?

A. Sometime.

Q. Sometimes—well, I mean occasionally you have seen him?

A. I have seen him checking trains, yes, certainly, and I have seen him doing other work.

Q. Just try to get one occasion in mind, if you can, so it will be clear, in which you on one occasion at least have seen him going along checking the train.

A. Yes.

Q. You may have been going in one direction and he going in the other, you might have passed each other or something like that?

A. Yes, sir.

Q. Now then, what did you see him do?

A. What is that?

Q. What did you see him do?

A. I saw him take the numbers of the cars and the seal records.

Q. What do you mean seal records?

A. I mean the number of the seal on the book.

Q. Where did he get the seal record from?

A. Off the seal.

Q. And take the number of it?

A. Take the number on the seal.

Q. And would he have a lantern with him?

A. Certainly.

Q. And the number is where on the seal? Did you ever see the number on a seal?

A. Yes, right along—it is on the seal, it is generally flat seals that the number runs along the seals.

Q. It is a flat seal and then the number is stamped right into it?

A. Yes.

Q. On a tag or is it just stamped right into the——

A. No, it is stamped in there with a regular stamp.

Q. And he has a flashlight, does he, or something of that kind?

A. He has a kerosene lantern.

Q. And you have seen him hold it up by the seals?

A. Always.

[fol. 367] Q. To get the number?

A. He has to hold it up to see them.

Q. He holds it up by the seal to get the number, and in his other hand he has got his book, has he? Is that correct?

A. Yes.

Q. And then after he gets the number on the seal he comes down, I assume, and changes and marks, writes it down?

A. Puts it in the book.

Q. That is what you have seen him do, correct?

A. Yes, sir.

Redirect examination.

By Mr. Kiendl:

Q. Mr. Keller, see if we can get some idea of the size of the seals on the car doors. Are they about as big as a half dollar or a quarter or as big as a nickel or are they as big as a silver dollar?

A. No, they are, 90 per cent of the seals or more, are a piece of flat tin probably that length (indicating), and then there is like a bell on one end, and these seals, all of them have numbers on and like the road initial and number and even a letter.

Q. You say like a piece of tin with a bell on the end, and where are the numbers pressed, on the piece of tin or on the end?

A. No, on the piece of tin lengthwise.
Q. On the piece of tin?
A. Lenthwise.
Q. And in order to take the numbers from that piece of tin you have got to be right close to it and look at it in order to write it down, isn't that so?
A. Oh, yes.
Q. You can't walk alongside the freight cars and look at seals and write numbers down in a book like I am doing now, can you?
A. No.
Q. It would be absolutely impossible to do at night?
A. No. Lots of times he would get hold of them and pull [fol. 368] them around so that he can get the number of them.
Q. And you have to get right close to them to write down these numbers like "B909563" etc. etc.?
A. No.
Q. It is physically impossible to read seals without getting up to them?

Mr. Hunt: I will have to object to the leading examination.
Mr. Kiendl: Of course it is leading.
The Court: Overruled.

A. Yes.
Q. How can you read a seal without getting close to it? Is it possible?
A. You cannot.
Mr. Kiendl: That is all.

James A. Dooner, called as a witness on behalf of the defendant, being duly sworn, testified as follows:

Direct examination.

By Mr. Kiendl:

Q. Mr. Dooner, how long have you worked for the Railroad Company?
A. 19 years, sir.
Q. And were you on this train on the night of the accident?
A. Yes, sir.

Q. With the other members of the train crew?

A. Yes, sir.

Q. And were you a brakeman or flagman on that train on that night?

A. Flagman, sir.

Q. Flagman?

A. Yes, sir.

[fol. 369] Q. You have been over that road between Avoca and Ashley many times?

A. Yes, sir.

Q. By day and by night?

A. Yes, sir.

Q. And where did you get on the train, at Avoca or where?

A. Avoca, sir.

Q. You reported there for duty?

A. Yes, sir.

Q. About what time in the morning?

A. I reported there around 12:40, sir.

Q. What are the duties of a flagman? Just generally describe them.

A. The duties of a flagman?

Q. Yes.

A. Are to protect the rear end of the train if the train should happen to stop, go back a sufficient distance to protect the rear end of this train; assist the conductor with his clerical work; and when going through switches to see that the switches are properly set for the main track, see that the switches are properly set. That is the duties of a flagman.

Q. And does the flagman have anything to do with keeping the records such as train lists and things of that kind?

A. Yes, sir.

Q. This train list in evidence here, Defendant's Exhibit F, is that in your handwriting?

A. Yes, sir.

Q. You had something to do with preparing this train list, did you?

A. Yes, sir.

Q. Did you do that regularly, make up a train list for your conductor?

A. Yes, sir.

Q. And you can identify the handwriting on that, and all the handwriting on it, as being yours, Mr. Dooner?

A. Yes, sir.

Q. Can you tell the Court and jury how you prepared the train list and what you did about it?

A. Southbound Ashley train pulled into the yard, the Avoca yard, the back leader of Avoca yard about 1:40, sir. [fol. 370] Q. Let's get this straight. The train pulled into the Avoca yard from where? Did it come from Susquehanna?

A. From Susquehanna, sir.

Q. And that is the train that comprised the major part of the train that you took on to Ashley?

A. Yes, sir.

Q. Did you add any cars to that train at Avoca?

A. Three cars, rear end, sir.

Q. And how many cars came in from Susquehanna on the other train?

A. 35, sir.

Q. Now, that train from Susquehanna came in about 1:40?

A. Yes, sir.

Q. When did you leave Avoca with the 35 cars and the 3 extra cars that you added at Avoca?

A. 2:10, sir.

Q. Will you tell us when that train got into Avoca from Susquehanna with the 35 cars, what you did in connection with the preparation of the train list that is in evidence as Defendant's Exhibit F?

A. I took the train check.

Q. Yes.

A. Conductor Keller and I walked up over the train from the rear end to the head end, I took the initials and numbers and kind of cars, Mr. Keller hollered contents and the destination, and I took the contents and destination down as he hollered while Mr. O'Boyle and Mr. McCarthy were putting the caboose and three cars on the rear end. After we done that I closed my book and Mr. Keller put all the bills together and I went to the rear end and got in the caboose, I took my slip and made my slip out, and the train started while I was making this slip out. After I made that slip out there is what you call a wheel report to make out. I separated my slips. You make an original and two carbon slips.

Q. Of the train list?

A. Yes, sir.

[fol. 371] Q. Yes.

A. I separated my slips, put one slip with the bills.

Q. And the other two?

A. The original slip goes to the yardmaster in Ashley yard to classify this train, the slip with this original slip; the other slip goes back to Avoca yard to be used as a record slip.

Q. Now, can you tell us, in this train slip you have got 38 cars listed by numbers 1, 2, 3, 4 all the way down to 38, can you tell us which was the head end of the train and which was the rear end?

A. No. 1 on the slip was the head car.

Q. By head car do you mean, as I understand you, the car next to the engine?

A. Yes, sir.

Q. And then are they numbered numerically all the way down to the rear end of the train?

A. Yes, sir.

Q. The last one being 3113?

A. The car next to the caboose.

Q. Next to the caboose?

A. Yes, sir.

Q. When the train left Avoca. By the way, you have down here on this train list "arrival Ashley 3:50 a.," for "a. m.," I assume?

A. Yes, sir.

Q. When did you put that notation on there?

A. Leaving Avoca, sir.

Q. You put that heading on the train slip when you left Avoca?

A. Yes, sir.

Q. Will you explain to the Court and jury why you put down here 3:50 as arriving time at Ashley?

A. Well we don't take the particular time on arrival at Ashley for this slip, we only take the conductor's, and I figured an hour and a half from Avoca to Ashley, and in order to get through with this slip I estimate the time.

Q. That is just an estimate of yours?

A. That is an estimate, sir.

Q. Do you know actually what time you arrived at Ash-
[fol. 372] ley that morning, of your own personal knowledge?

A. Yes, sir.

Q. What time was it when you arrived there?

A. 4:40, sir.

Q. How do you know it was exactly 4:40?

A. I asked the conductor.

Q. Oh, you asked the conductor?

A. Yes, sir. I myself asked him.

Q. And after you had done this work, did the train at some time start?

A. The train was going while I was doing that work, sir.

Q. Now, when you and the conductor went up alongside the train did you notice anything defective or out of order at any part of the train the side of which you went along?

A. No, sir.

Q. Do you know whether or not they had car inspectors at Avoca?

A. Yes, sir, I know there is.

Q. Were they working that night?

A. Yes, sir.

Q. You saw the two on the stand, Mr. Howell and Mr. Cook?

A. I saw Mr. Howell and Mr. Cook, and I conferred with Mr. Cook at the head end of the train if the other side was all right, and he told me O. K.

Q. You conferred with Mr. Cook about it?

A. Yes, sir, about the other side of the train.

Q. When you started out on the way to Ashley did you know of the occurrence of any accident on that trip?

A. No, sir.

Q. When did you first learn about that occurrence?

A. On my arrival at Avoca Mr. Keller told me.

Q. You had gone to Ashley and made a return trip to Avoca?

A. Yes, sir.

Q. And then Mr. Keller told you someone had been injured?

A. He told me Mr. Tompkins had had his arm off at Pittston Summit.

[fol. 373] Q. And did you remember when Mr. Keller told you, that you were a member of the train crew on that train?

A. Let me get that right.

Q. When Mr. Keller told you that this man had this accident somewhere near Pittston Summit, you, of course, remembered then that you had been one of the crew of that train, the flagman?

A. Yes, sir.

Q. Do you remember how fast that train was going from the time it left Avoca until it passed Rock Street crossing?

A. No, sir.

Q. Was it going 30 or 35 miles an hour?

A. Oh, no.

Q. At any part of it?

A. No, sir, that train couldn't go that rate of speed.

Q. The train could not go that rate of speed?

A. No, sir.

Q. Why not, Mr. Dooner?

A. The pull was too great for the size engine we had. That engine couldn't make over eight to ten miles an hour with the train.

Q. In that part of it, along that track?

A. In that vicinity of that territory.

Q. Well, tell us what you know about the territory. Is it up-hill or down-hill or level?

A. It is up-hill from Avoca until you hit the other side of Rock Street crossing.

Q. And you say that this engine, 2499 of the J2 class with 38 cars and a caboose and a coal car, could not go over that territory faster than how many miles?

A. Eight to ten miles an hour, sir.

Q. And that is your best recollection of the speed of the train over that part of that line?

A. Yes, sir.

Q. It did not make any stops during that run of any kind?

A. William Street was our first stop.

Q. And that is beyond Rock Street crossing nearer Ashley, isn't it?

A. Yes, sir.

[fol. 374] Q. Do you remember whether or not any signal was given by the whistle of this train as it approached the Rock Street crossing?

A. Yes, sir, I heard the whistle blowing for Rock Street crossing, I heard it blowing for Center Street crossing before it made the Rock Street crossing.

Q. You heard it blow for the Center Street crossing?

A. And Rock Street crossing.

Q. Were you in the caboose at that time?

A. Yes, sir.

Q. 38 cars behind the engine?

A. Yes, sir.

Q. And nothing else, nothing you have heard here in court or anything of that kind?

A. No, sir.

Q. You are not telling anything that you heard some other witness say or anything of that kind?

A. No, sir.

Q. You remember that on this night, the night that Mr. Tompkins lost his arm, that you asked the conductor what time it was when you got to Ashley and he said 4:40?

A. Yes, sir.

Q. That is a fact, sir?

A. Yes, sir.

Q. At that time, of course, you did not know there was any accident to Mr. Tompkins at all; in fact you did not know that until the next day? That is true, is it?

A. That morning when we arrived at Avoca, sir.

Q. And when did you—what time did you get into Ashley the night before Mr. Tompkins lost his arm?

A. I can't recall, sir.

Q. Well, you asked the conductor, didn't you?

A. Well, that slipped my mind, sir.

[fol. 376] Q. That slipped your mind?

A. Yes, sir.

Q. And the night that Mr. Tompkins had the—the next night, the night of the 27th, what time did you get into Ashley?

A. 4:40, sir.

Q. Well, the following night what time did you get in?

A. I don't know, sir.

Q. Well, you asked the conductor, didn't you?

A. Yes, sir, but I can't recall.

Q. You can't recall that?

A. No, sir.

Q. This is the only night you can recall?

A. Yes, sir.

Q. You say this is the only night that you can recall?

A. How is that? The only night I can recall?

Q. Yes.

A. Because I asked Mr. Keller.

Q. That is the only reason you have?

A. Yes, sir.

Q. No other reason?

A. No other reason, sir.

Q. Simply you asked Mr. Keller?

A. Yes, sir.

Q. The accident had nothing to do with it at all, because you did not know about the accident, did you?

A. Didn't know anything about the accident until the following morning, sir.

Q. And then you found out. When did you come down to New York, sir?

A. Friday, sir.

Q. Last Friday?

A. Or Saturday, sir.

Q. Saturday?

A. Yes, sir.

Q. And since you came to New York you have been staying with the other witnesses, somewhere, of course?

A. Yes, sir.

Q. And what man from the railroad is concerned or had you gentlemen in charge? Who has been looking after you?

A. Mr. Cannon, sir.

Q. What is his job?

A. Lieutenant, sir.

Q. Lieutenant?

A. Yes, sir.

Q. Lieutenant of what?

A. Police.

Q. He is one of the railroad detectives, you mean?

[fol. 377] Mr. Kiendl: I object to that, if your Honor please, as wholly immaterial to any issue in this case as to who Mr. Cannon is or what he is doing or why.

The Court: I don't see the purpose of it.

Mr. Hunt: I will come right to it, if Mr. Kiendl doesn't see it.

Q. And has he been talking with you about what your testimony was going to be when you got on the stand?

A. No, sir.

Q. What?

A. He has not, no, sir.

Q. He has not?

A. No, sir.

Q. Hasn't he talked with you about this case?

A. No, sir.

Q. Hasn't talked with you and hasn't said a word about the case at all to you?

A. Only that the case was down here in New York, that is all.

Q. Has he been with you since you came here to New York?

A. Yes, sir.

Q. Every day?

A. Yes, sir.

Q. Every evening?

A. Yes, sir.

Q. And he has never talked to you about this case at all?

A. No, sir.

Q. And you haven't heard him talk to any of the other witnesses?

A. No, sir.

Q. This railroad detective.

A. No, sir.

Q. Now sir, have you talked—who from the railroad have you been talking with, you and the other witnesses?

A. We conferred with Mr. Kiendl.

Q. Now, before you ever talked to Mr. Kiendl, who did you talk to before you ever talked to Mr. Kiendl about this case?

A. The claim agent.

Q. The claim agent? What is his name?

A. I don't know his name.

Q. Well, have you,—did he come down with you?

A. No, I met him down here.

[fol. 378] Q. You met him down here?

A. I talked with that man sitting with Mr. Early over there.

Q. And has he been talking with you about this case?

A. Mr. Early?

Q. Yes.

A. Just got my statement about it.

Q. Has he been talking with you since you came to New York?

A. No, sir.

Q. Did he ask you anything about what time the train got in there?

A. No, sir.

Q. Nobody asked you what time the train got in there before you went on the stand?

A. No, sir.

Q. Mr. Kiendl did not ask you what time the train came in there before you went on the stand?

A. No, sir, Mr. Kiendl did not.

Q. Now, how many years has it been, sir, since you saw—take one of your own wooden cars—since you have seen one of the doors off the flange of the rail, how many years has it been since you have seen that?

A. Why, my 19 years' experience on the road I haven't seen one, sir.

Q. You haven't seen one at all?

A. No, sir.

Q. You have never heard of a——

Mr. Kiendl: If your Honor please, for the purpose of the record I make the same objection and want the same exception as to this line of cross-examination that I made with the last witness, that it concerns matters on which this witness was not examined in chief, and for those purposes we must insist that the plaintiff is making the witness his own witness.

The Court: Overruled. Proper cross-examination.

Mr. Kiendl: Exception.

[fol. 379] Q. After how many years has it been, if at all, since you have seen a reefer door open when it is either in the yard or out on the tracks?

A. You mean a moving train?

Q. Yes, either a moving train or a standing one, how many years has it been?

A. I haven't seen any reefers open on moving trains.

Mr. Kiendl: What is that answer?

The Witness: I haven't seen any reefers open on moving trains.

Q. How about a standing car?

A. Why, I have seen them open where they were unloading them.

Q. Outside of where they were unloading them, how many years since you have seen a reefer door open, if at all?

A. I have seen them open when they are unloading those cars, that is all.

Q. You have told me that. I don't mean when men are around there working, of course. I don't mean at that time, but I mean when there is nobody around there working at all and you see a car standing on the siding or in a yard

or anywhere, how many years has it been since you saw a reefer door open?

A. I have seen none open, sir.

Q. Never in your whole nineteen years, you have never seen one?

A. No, sir.

Q. Don't know anything about that at all?

A. No, sir.

Q. And nobody has talked with you about that since you went on the witness stand or before you went on the witness stand?

A. No, sir.

Redirect examination.

By Mr. Kiendl:

Q. Now, Mr. Dooner, irrespective of who may have talked to you from the time of the day of this accident [fol. 380] down to this minute, are you telling this Court and jury what you know to be the truth?

Mr. Hunt: Allowing the witness to characterize his own testimony.

Mr. Kiendl: In the light of the cross-examination.

The Court: Overruled.

Mr. Hunt: Exception.

Q. Listen to that question again, Mr. Dooner, so you have it in mind, and look at these men and tell them——

Mr. Hunt: I object to this, may it please the Court.

The Court: Objection sustained.

Mr. Kiendl: I submit, your Honor, I want to undo the harm he did by suggesting that somebody had told him what and what not to testify to, and I submit I have an absolute right to bring it out.

The Court: Objection overruled.

(Discussion off the record.)

Mr. Kiendl: Now we will go back to it.

Q. No matter who has talked to you about this case at any time,—lieutenant of police, claim agents, Mr. Kiendl, anybody else, is the testimony that you have given here on this witness stand the truth?

A. Yes, sir.

Mr. Hunt: Objected to.
The Court: Overruled.

Q. And your answer is yes, sir?
A. Yes, sir.

Q. Now, you have been asked how you happen to remem- [fol. 381] ber about this time of 4.40, the arrival of this train at Ashley. Did you tell Mr. Hunt that you made a notation of it in something that you called a wheel book?
A. Yes, sir.
Q. And is this the wheel book that I hold in my hand?
A. Yes, sir.
Q. And have you seen that wheel book since?
A. Yes, sir.
Q. And has it a notation in your own handwriting as to when that train arrived at Ashley (handing)?
A. Yes, sir.
Q. And what is the time there in your own handwriting?
A. 4.40, sir.
Q. That is all.
A. The night previous to that I was not flagging that job.
Q. And from your train book, if you look at the entry, you can see the time any train you were on that went to Ashley arrived at Ashley when you were flagging?
A. Yes, sir.

Recross-examination.

By Mr. Hunt:

Q. And when I asked you about that matter you did not tell me anything about the wheel book as being the——

Mr. Kiendl: He did tell you about the wheel book.
Mr. Hunt: Now your Honor——
Mr. Kiendl: That question is unfair.
The Court: Gentlemen, both of you gentlemen are excellent lawyers, and it doesn't pay to get into an argument.
Mr. Hunt: But when I asked him——

Q. When I asked you about it, I asked you how it was you remember that this train got in at 4.40, do you remember that?
A. Yes, sir.

[fol. 382] Q. And you said it was because you had asked the conductor.

A. I asked the conductor.

Q. All right; and at the same time, when I asked you my next question, if there was any other reason—do you remember my asking you that?

A. When I am flagging that job I always——

Q. No, I want to show I was fair to you in my question. Now, do you remember I asked you whether there was any other reason that you remembered on this particular night, and you said no, that was all? You remember that answer?

A. Yes.

Q. Now, if you had told me about the wheel book we could have referred to some book, couldn't we?

A. Yes.

Q. Now, you made a mistake before, you didn't think about the wheel book while I was questioning you, is that it?

A. That is right, sir.

Mr. Hunt: I would like to see the paper from which the witness refreshed his recollection, which now, really, I am entitled to see.

Mr. Kiendl: Certainly. Do you want the witness?

Mr. Hunt: No.

Mr. Kiendl: Are you through with the witness?

Mr. Hunt: I am through with the witness.

William H. Henning, called as a witness on behalf of the defendant, being duly sworn, testified as follows:

Direct examination.

By Mr. Kiendl:

Mr. Hunt: Will your Honor indulge me just a minute, [fol. 383] please? I will offer this page in evidence.

Mr. Kiendl: No objection.

(Marked Plaintiff's Exhibit No. 7.)

Mr. Hunt: I ask that the jury read this page.

The Court: What do you designate that?

Mr. Hunt: It is known as the wheel book, I find out; is that right, Mr. Kiendl?

Mr. Kiendl: The wheel book or conductors' train book.

(Book shown to jury.)

Mr. Kiendl: Is that the part you are offering?

Mr. Hunt: I am offering the whole page, but I am calling the jury's attention to the part that the witness used.

Q. Mr. Henning, you were the engineer on this train?

A. Yes, sir.

Q. And you have been an engine man all your working life, haven't you?

A. Yes, sir.

Q. Would you mind telling us how many years?

A. From January 7, 1905, 32 years, next January.

Q. And during part of that time did you fire before you became an engineer?

A. About five years and six months.

Q. Then you became an engineer and have been an engineer ever since?

A. Yes, sir.

Q. And worked with this railroad that entire time?

A. Yes, sir.

Q. And have you worked on this part of the Wyoming Division that we are talking about in this case, between [fol. 384] Avoca and Ashley?

A. Yes, sir; the first man that ran down that territory, that is to Ashley.

Q. And you know that territory pretty well?

A. Yes, sir.

Q. You have operated freight trains down there in the day and in the night?

A. Yes, sir.

The Court: Did you enter the service of the Erie Railroad Company in 1904?

The Witness: I entered the service of the railroad, Wyoming Valley, in 1898, September 27th, and was promoted from wiping engines and coaling to fireman, in September, 1898, and promoted to an engineer on January 7, 1905, I ran my first day.

Q. This Ashley Special carried freight cars down to the Central Railroad at Ashley, didn't it?

A. Yes, sir.
Q. From Avoca?
A. Yes, sir.
Q. Now, you had a fireman, of course, in your locomotive?
A. Yes, sir.
Q. And his name was——
A. Charles Edwards.
Q. And he is here in court?
A. Yes, sir.
Q. And the number of your engine—I am reading some car report—is 2499. Is that a J2 engine?
A. Yes, sir.
Q. And had you driven these J2 engines many times in your extended experience as an engineer?
A. Well, in the last ten years that I have been on the run we have had all J2 engines. Before that we did not have them.
Q. Now, do you remember the run at all on the night when this accident happened, the run from Avoca to Ashley?
A. Yes, sir, I do.
[fol. 385] Q. Do you remember the track from Avoca to Rock Street?
A. Yes, sir, I do.
Q. What sort of a track is it? You tell the jury what you know about it.
A. Why, it is a good piece of track on the Wyoming Division until we get down on the Central Railroad, and then it isn't so bad.
Q. You like the Erie track better than the Central Railroad track, is that the idea?
A. Yes, sir; but that is a good piece of track from Avoca to Plains Junction.
Q. And what is the level or grade of the track from Avoca to Rock Street?
A. There is a heavy grade from Avoca, from the back leader to just as you are pitching over Rock Street, and from Rock Street south it begins to get kind of level, and about 40 car lengths or 43 car lengths you pitch over the grade and in a space of 43 car lengths we have got to stop to flag William Street. On this track from Avoca to Pittston Summit we call it, Rock Street is right there, there is an S curve in that and it is impossible for the J2 engines

with 38 cars or more to make any speed over 10 miles an hour in that territory.

Q. You testify to that as a result of your experience as an engineer on this particular division?

A. Yes, sir.

Q. How fast was the train going over that territory that night from Avoca up to Rock Street?

A. Well, I don't think we were traveling over 10 miles an hour. At Rock Street, now, I speak of.

Q. Well, from Avoca all the way up to Rock Street, is that about——

A. Well, I would not say ten miles an hour there because I have got to slow up for the back leader, which is 28 car lengths, and will have the engine on an S curve.

Q. Yes.

A. And the grade is pretty heavy around this S curve [fol. 386] until you get the rear end over—well, I don't know, we call it No. 8, I don't know the name of the street there.

Q. Well, where is it with respect to Rock Street, to the north?

A. That is north of Rock Street.

Q. Then you get over your S curve and you are going toward Rock Street from Avoca, and you say there is a heavy grade all the way up to Rock Street?

A. Heavy grade all the way up to Rock Street.

Q. What speed were you making on that section of track until you got up to Rock Street?

A. I would say about ten miles an hour there.

Q. About ten miles?

A. There, yes.

Q. And at any point from the time you left Avoca until you had passed Rock Street, had your train on that night gone anything like 30 or 35 miles an hour?

A. No, sir, no, sir.

Q. Was there anything unusual about the operation of this train on that particular night over that track, or was it the same as usual except you may have had more or less cars on?

A. Well, I just did not get that question right.

Q. Well, did you operate your engine and your train over that track on the night when this accident happened the same way you have always operated it?

A. No, I would say no, for this reason. If I had less cars than 38 cars, then I would not work the engine full stroke, but with 38 cars we have to work that engine full stroke and a wide-open throttle.

Q. That is just what I want to get at. A wide-open throttle would mean you are giving to the engine all the steam that she can possibly take?

A. Yes, sir.

Q. Were you doing that on the night in question?

A. Yes, sir, with these 38 cars or any other 38 cars.

Q. Your engine throttle was wide open?

A. Yes, sir.

[fol. 387] Q. And the steam going into the cylinders was all the steam that you could get into those cylinders?

A. Yes, sir.

Q. And with those 38 cars, some loaded and some empty?

A. Yes, sir.

Q. On that track, your throttle wide open, at no time were you going over 10 miles an hour, in your opinion?

A. No, sir, not over 10 miles an hour.

Q. And you say you could not go faster than that?

A. I could not if I wanted to.

Q. When your engine has the throttle wide open, does it make some noise, the noise of escaping steam?

A. Yes, sir, it does, plenty of noise.

Q. And 38 cars going uphill, being pulled under those conditions, can you hear the rolling of the cars on the tracks?

A. Not very handy.

Q. Not very handy. Well now, your locomotive had a headlight on, did it?

A. Yes, sir.

Q. And what did the headlight consist of?

A. It consists of a reflector, electric globe. It is an electric headlight globe.

Q. And what did you have in the engine to turn that on and off?

A. We have a switch just overhead.

Q. Was that electric headlight on at all times while you were operating that engine that night?

A. Yes, sir.

Q. Have you ever driven an engine blind without a headlight on in your life?

A. Not in my 32 years.

Q. That headlight, did it cast a ray or a gleam out somewhere in front of your train?

A. Why, it is similar to an automobile light, only stronger. It casts a ray out.

Q. And does it cast the ray out right directly in front of your engine or out in front along the road?

A. I would not say so, I would say that there is a kind of a shadow there—well, I don't know, I guess I will have to [fol. 388] guess at it, because I never made any measurement—I would say—I want this to be only truthful—between 15 and 25 feet.

Q. And that shadow where the ray does not show on the tracks, is that the shadow you are talking about when you are running on a straight track or running on a curve or what?

A. Well, that would be most any place.

Q. As you approach Rock Street, you knew there was a curve on the track as you came up from Avoca towards Hughes and Rock Street?

A. Yes, sir, there is a curve there.

Q. And in operating that train the curve would be taking you around to the left, wouldn't it?

A. Yes, sir.

Q. Would that have any effect on your headlight insofar as it would show on the tracks?

A. Yes, sir, that headlight——

Q. Well now, try to explain to the Court and jury just how that would work.

A. Your headlight is set directly in the center of the smoke-box there, and when you are running a left hand curve it is focused toward the right hand side of the track, and when you are going in the opposite curve, on a right hand curve, it is focused to the left hand side.

Q. And it depends on the size of the curve as to how far off to the right or the left the ray shows?

A. Yes, sir.

Q. It is possible in going around a curve that the headlight threw itself on the track all the time as distinguished from one side or the other?

A. No, just as I said.

Q. Well now, in addition to that headlight, did you have a bell on your locomotive?

A. Yes, sir.

Q. Is that what I call an automatic bell?

A. Yes, sir, it is.

[fol. 389] Q. How did it operate?

A. It is operated by air; there is a valve in the cab that sets right in front of the engineer in these J2 engines—well, mostly all of them, but these J2's, because a J2 engine is an engine I have all the time, and there is two sanders, front and back, and the bell ringer that is operated by compressed air.

Q. Did you ring that bell at any time as you approached this section, Rock Street crossing?

A. Yes, sir, all crossings.

Q. Now, do you remember whether you had the locomotive bell ringing that night as you went up to and over the Rock Street crossing?

A. Yes, sir, I had the bell ringing at all crossings, and that crossing.

Q. How about your whistle? You have a locomotive whistle?

A. Yes, sir.

Q. Did you blow that for the Rock Street crossing as you approached it?

A. Yes, sir.

Q. Now, did you see the plaintiff that night at any time as you operated your train on that track and over Rock Street?

A. No, sir, I didn't see anybody.

Q. Did you know that there had been an accident at any time before you got to Ashley?

A. No. The first I knew about the accident—now, I am not so sure on this whether the officer got on at Pittston Summit and showed me in the paper, or whether it was at Avoca, a fellow named Jack Evans, an officer, and he told me that there was a fellow got his arm off at——

Mr. Hunt: Wait a minute.

Q. I don't want you tell what some officer down there told you, but you did hear some time the next day, was it?

[fol. 390] A. Oh, he showed it to me in the paper that morning on the way back.

Q. But you didn't know about any accident on your way down to Ashley?

A. No, sir.

Q. It was after you left Ashley before your return trip before you ever heard of an accident?

A. It was after I got back to Pittston Summit or Avoca, I don't know which.

Q. How wide is your engine, in your opinion, I mean this J2?

A. Well, I should judge, and I think I will be telling the truth to tell you that it is about 10 feet from the outside of one cylinder to the outside of the other.

Q. And that is the widest part of your engine, is it?

A. Yes, sir. The breast beam is only about 8 feet.

Q. Have you seen people walking along the track there at Rock Street from time to time?

A. Yes, sir.

Q. And when your train comes along, if you give them warning, what do they do?

Mr. Hunt: I object to that as incompetent, irrelevant and immaterial, absolutely improper.

The Court: Objection overruled.

Mr. Hunt: Exception.

A. They step out of the way of the train, if they are walking along the track, step to one side.

Mr. Kiendl: You may inquire.

Cross-examination.

By Mr. Hunt:

Q. Mr. Henning, I think this picture will probably show as well. Your headlight is up on your engine approxi- [fol. 391] mately how many feet above the ground, can you tell me?

A. Well, I would say three feet above the pilot.

Q. Well, that doesn't help us, I don't know how high the pilot is. Figure that out. About how high?

A. You have got a 56-inch wheel, and you have a pencil there so you can figure that out, 56 inches in that.

Q. And how high above the wheel?

A. I would say 3 feet above the pilot.

Q. Well then, would it be all right to say somewhere between 7 and 8 feet above the ground?

A. Why, I would say——

Q. Or higher than that?

A. I would say about 6 feet.

Q. The headlight on an engine is only the height of a man standing on the ground, a man a little taller than you, Mr. Henning? Is that a fact?

A. Yes. It may be 8 feet or so.

Q. If a man of Mr. Kiendl's proportion stands and looks at that headlight, he is looking up decidedly, isn't he?

A. Yes. But now, you just get this right. This headlight is not set on top of the smoke-box; it is set in the center of the smoke-box.

Q. Oh, I know. With your years of experience, I am asking you to help us to this extent: Can you tell us whether, if a six-foot man were standing in front of that engine, how far above his head would this headlight be?

A. Well, I would say maybe it is 8 feet.

Q. Now, that light is not projected out exactly straight, it is tilted down somewhat toward the ground; am I correct?

A. I would not say so.

Q. Well, I don't know.

A. It shows 800 feet ahead, according to law.

Q. Do you know whether the headlight, assuming that [fol. 392] is a headlight, now, is that headlight on the engine projected, is that headlight projected straight out, or do they——

A. I would say straight out.

Q. Straight out. All right, sir. And then being projected straight out, that accounts for this dark space that you said was immediately in front of the engine?

A. I would say so.

Q. Wait until I finish. To the extent of 25 or 50 feet?

Mr. Kiendl: He said 15 to 25, I think.

Q. Did you say 15 to 25 feet?

A. I think I did.

Q. Did you?

A. Yes, I think I did.

Q. All right, I am sorry, sir. Now then, can you take this picture and look at it. Have you ever seen it before?

A. I don't think I have seen it before.

Q. I have only three or four questions to ask you if you will try to help me.

A. I haven't seen these pictures.

Q. Now, you say that road-bed is at least four to five feet above the houses, is it—I mean the ground on which the houses are resting; is that not a fair statement?

A. How is that?

Q. Your road-bed, the thing on which the engine runs.

A. I see.

Q. Is four or five feet higher in elevation than the land on which the houses are setting?

A. Yes, I guess that is right.

Q. And so your headlight would be 13 feet higher in elevation than the land on which the houses are setting?

A. That would be about right.

Q. Now, as you come around that curve your headlight shows straight across on about the top of the houses, doesn't it? That is what you would say?

A. Well now, that is further back there.

[fol. 393] Q. As you come——

A. You are coming around here now, around the curve, direct straight line—let me get this thing right.

Q. I am not trying to confuse you at all.

Mr. Kiendl: Let him explain to you, Mr. Hunt.

Q. As you go along, your headlight would first hit the house I am pointing at now, wouldn't it?

A. That is correct.

Q. And gradually it would swing over until it hit this next house?

A. Yes.

Q. And it would hit about the tops of the houses, wouldn't it?

A. Well, I don't know.

Q. Well, your headlight is about 13 feet above the land on which the——

A. About in here.

Q. You are indicating about what, the middle of the house?

A. About the middle of the house.

Q. Hit about the middle of the house from the top to the bottom?

A. Yes, from the middle to the top.

Q. Now, as you continued around your light would keep projecting as I am indicating this way (indicating)?

A. It would keep going this way (indicating) to keep going around the curve.

Q. The next thing it would hit after hitting the house would be the curve and the corner of Rock Street and the railroad, wouldn't it?

A. Yes.

Q. Then it would hit Rock Street just opposite that little house; in other words, it would not hit Rock Street curve until you completed that curve, would it?

A. Until I had completed this curve.

Q. Until you had completed that curve?

A. The rear end would be here (indicating).

Q. And walking along here, is that the action of your light, with respect to anyone walking along—there would [fol. 394] be some place, that is it starts over here, and as your train swings it will swing right across the back of a person just as I am indicating with my pencil, is that right?

A. Well, you mean a person——

Q. At night time, going around that curve and coming to Rock Street, is your light directly in front of you here? You are dark here (indicating), your light is going across the fields and hitting the houses instead of the track in front of you, isn't it?

A. Well, I don't quite get your question.

Mr. Hunt: That is all, sir.

(Short recess.)

CHARLES EDWARDS, called as a witness on behalf of the defendant, being duly sworn, testified as follows:

Direct examination.

By Mr. Kiendl:

Mr. Kiendl: If your Honor please, by stipulation, referring to the sheet in the so-called conductor's train book that has been offered in evidence by the plaintiff as Plaintiff's Exhibit 7, under the heading "Where taken," the head of the page, appears W168, that is the station number at the Avoca yard where the train started. Under the heading "Where left" are the letters "AH," which means Ashley,

and under the heading "Time Taken" is "2.10 a.," which means 2.10 a. m., and at various places on the page there are dashes in pencil. Those mean ditto marks.

[fol. 395] Q. You are Mr. Edwards, the fireman?

A. Yes, sir.

Q. And you were the fireman on this engine 2499, the night of this accident?

A. Yes, sir.

Q. And the engineer is the man who was on the stand before you?

A. Yes, sir.

Q. Was there anybody else in the cab of the locomotive that night?

A. Mr. O'Boyle.

Q. He was the head brakeman?

A. Yes, sir.

Q. And the engineer is on the right hand side of the engine?

A. Yes, sir.

Q. And the fireman, when he is not actually shoveling coal, is on the left side?

A. Yes, sir.

Q. And where is the head brakeman's position? Does he sit behind you or behind the engineer or where?

A. In front of me.

Q. On the night of the accident, what in your opinion was the speed of this train as it went from Avoca on up over this Rock Street crossing?

A. From 8 to 10 miles an hour.

Q. And is that about the speed that—was the engine bell ringing when the train went over the Rock Street crossing?

A. Yes, sir, he always rings the bell at every crossing.

Q. And how about the whistle, was the whistle blowing that night?

A. He does the same thing with the whistle.

Q. Was the headlight lit?

A. Yes, sir.

Q. Did you see the plaintiff at any time on or near the tracks?

A. No, sir.

Q. Did you know that an accident happened until later?

A. Not until we were coming back to Avoca.

Q. When you came back to Avoca you learned of the occurrence of an accident?

A. Yes, sir.

Q. And your job as fireman is to keep the fire going to keep up steam?

A. Yes, sir.

[fol. 396] Q. And you were performing your job that night?

A. Yes, sir.

Q. And where were you when this train approached this crossing, Rock Street crossing?

A. I was on the left of the engine.

Q. On the left of the engine?

A. On the left of the engine on my seat.

Q. Were you looking out ahead?

A. Yes, sir.

Mr. Kiendl: Your witness.

Mr. Hunt: No cross-examination.

JOHN FRANCIS O'BOYLE, called as a witness on behalf of the defendant, being duly sworn, testified as follows:

Direct examination.

By Mr. Kiendl:

Q. You were the head end brakeman of this train, Mr. O'Boyle?

A. Yes, sir.

Q. And you were up in the locomotive cab as the train approached this Hughes and Rock Street section that we have been talking about?

A. Yes, sir.

Q. How fast was the train going when it got up near there?

A. I should judge about 10 miles an hour.

Q. And was the headlight lit?

A. Yes, sir.

Q. And how about the whistle and bell; do you know whether they were operated?

A. The whistle blew and the bell rang.

Q. And you heard about the accident when?

A. On our arrival at Avoca.

Q. What were you doing in the locomotive as you went over this territory across Rock Street?

A. I was sitting in the front forward seat.

[fol. 397] Q. Were you looking ahead?

A. I was looking straight ahead, the door was open and it was kind of a warm night, and the windows was open and I was looking straight ahead for automobiles on the crossing or something like that, because we were approaching that town.

Q. Did you see the plaintiff at any time yourself?

A. No, sir.

Q. You didn't know he was hurt until you got back to Avoca the next day?

A. No, sir.

Q. You had nothing to do with the inspection of any of the cars on this train, did you?

A. No, sir.

Q. You did not keep the train book or the train list or any of those things?

A. No, sir.

Q. Your job was to do what work a brakeman would have to do at the front part of a train in switching and taking out a flag to protect the crossing and things of that kind?

A. Cut the engine on and couple up the air and cut in the air, meaning to open up the air and let the air pass through the entire train.

Mr. Kiendl: You may examine.

Cross-examination.

By Mr. Hunt:

Q. How many years have you been in the railroad business?

A. 29 years.

Q. Just a question or two. How many years has it been since you have seen, taking the—referring to a box car first, how many years since you have seen the door of a box car sprung off the run or rail that it runs on?

Mr. Kiendl: To be consistent, may I have the same objection and exception to this line of questioning?

[fol. 398] The Court: Same ruling.

Mr. Kiendl: So it won't be assumed to have been waived in any sense.

Q. How many years?

A. None that I can remember.

Q. None. And there hasn't anybody by chance spoken to you about that since yesterday afternoon when it developed here, has there?

A. About this case?

Q. No, has anybody spoken to you since yesterday afternoon to the effect that in case I asked you about the doors springing off the rails that you have no recollection of any such thing?

A. No, sir.

Q. Has anybody asked you about that at all?

A. No, sir.

Q. And you haven't talked with anybody about that?

A. No, sir.

Q. And you as a railroad man never have seen the side doors of the car off the rail, is that exactly it?

A. No, not in transit or anywheres like that.

Q. Nowhere?

A. I have never seen any of them off those rails.

Q. What did you say about traffic?

Mr. Kiendl: He never had seen any of them off the rails.

Q. Did you say anything about traffic?

A. Not in transit.

Q. Well, that means the same thing, in transit; you mean by that, in motion?

A. Yes.

Q. Now take in the yards, have you ever seen that?

A. No, sir.

Q. Then you have never seen them at any time?

A. No, sir.

Q. Any place?

A. No, sir.

[fol. 399] Q. And the reefer doors in the yards, you have never seen a reefer door open?

A. I did once in Port Jervis.

Q. Once in Port Jervis?

A. Yes, sir.

Q. And did you go over and close it?
A. No, sir; there were people taking those slats out of the car.
Q. Oh, you mean people were working on that car?
A. No, they were people from the town there was getting those slats out of the car that come as crating.
Q. Well, people in the town had gone there?
A. Yes, sir.
Q. Did you do anything about it?
A. No, sir; I was going on my way up the road.
Q. And that is the only reefer door you ever saw open?
A. That is all that I can remember.

DANIEL F. MCCARTHY, called as a witness on behalf of the defendant, being duly sworn, testified as follows:

Direct examination.

By Mr. Kiendl:

Q. Mr. McCarthy, you were the rear end brakeman or flagman on this train?
A. Middle brakeman.
Q. Middle brakeman?
A. Yes, sir.
Q. The flagman and the conductor and the head brakeman have already been on the stand. You were what was called the middle brakeman?
A. Yes, sir.
Q. That is the extra brakeman?
A. I was extra brakeman; full crew man law.
Q. And where were you when the train left Avoca?
A. At the head end.
[fol. 400] Q. And did you ride the head end or did you ride the middle or the rear end of the train?
A. Stayed there until the train pulled out.
Q. And then where did you go on the train?
A. I was on the last end, on the caboose.
Q. And then did you ride in the caboose from that point on down to Ashley?
A. Yes, sir, down to Miners Mills.
Q. Down to Miners Mills?
A. Yes, sir.

Q. Do you know this territory of Rock Street and Hughes Street in Hughestown that we are talking about?

A. Yes, sir.

Q. What do you say the speed of the train was as it went over that territory there?

A. Anywheres from 10 to 12 miles an hour.

Q. That is your best estimate?

A. Yes, sir.

Q. At any time did it go anything like 30 or 35 miles an hour?

A. Not to my knowledge. We could not do it.

Q. What was that, it could not do it, you say?

A. Yes, sir.

Q. Do you know anything about any signals by locomotive whistle or bell or anything of that kind given at that point? Did you hear the whistle?

A. That night?

Q. Yes.

A. Yes, sir.

Q. Did you hear the bell?

A. No, sir.

Q. Did you see the headlight?

A. At the Avoca yards, sir.

Q. At Avoca yard?

A. Yes.

Q. You did not see it thereafter?

A. No, sir.

Q. You didn't know anything about the occurrence of an accident until you got back to Avoca, did you?

A. No, sir.

Mr. Kiendl: That is all.

Mr. Hunt: No cross.

[fol. 401] Mr. Kiendl: Defendant rests.

Mr. Hunt: Plaintiff rests.

MOTION TO DISMISS

Mr. Kiendl: If your Honor please, the defendant renews its motion made at the close of the plaintiff's case, on the same grounds, because the plaintiff has not established any actionable negligence whatsoever on the part of the Railroad Company and on the further ground that on the whole

case it has been affirmatively established, as a matter of law, that the plaintiff was guilty of contributory negligence and cannot recover in this action.

The Court: Motion denied.

Mr. Kiendl: Exception.

The Court: How much time will each of you gentlemen require for summation?

(Discussion off the record.)

The Court: Under the circumstances, that is two hours, and my charge will take anywhere from 20 minutes to half an hour. That is two and one-half hours, and it is four o'clock now. Do the jury want to stay here?

Juror No. 7: I made an appointment for five o'clock.

The Court: How do the other jurors feel about it?

Juror No. 5: I think Tuesday would be much better.

Juror No. 8: Not tonight.

The Court: Is that the way all of you gentlemen feel?

Juror No. 5: I think that would be much better.

The Court: How do you feel about it?

[fol. 402] Juror No. 6: The same as the rest of them.

Mr. Kiendl: I heard the last juror suggest Tuesday.

The Court: Well, have the attorneys any objection to this matter going over until Tuesday?

Mr. Hunt: I have none, sir.

Mr. Kiendl: I have none, sir.

The Court: Very well, gentlemen. Do not discuss this case among yourselves or with anyone else until you finally get it for determination from the Court and from counsel on both sides.

Will you gentlemen see to it that you have your requests to charge on Tuesday, as is the rule of the court?

Mr. Kiendl: Oh yes indeed, before we start our summation.

Mr. Hunt: Yes, your Honor.

The Court: Very well, 10.30 Tuesday, October 13th.

(Adjourned to October 13th, 1936, 10.30 a. m.)

New York, October 13, 1936,
10:30 o'clock a. m.

Trial resumed.

(Mr. Kiendl summed up to the jury on behalf of the defendant.)

(Mr. Hunt summed up to the jury on behalf of the plaintiff.)

[fol. 403] PLAINTIFF'S REQUESTS TO CHARGE

1. If they believe there was a door swinging on the side of the train in question or any other unusual projection sticking out from the side of said train, then there is a presumption that the Erie Railroad was negligent and failed to use reasonable care. Refused. Exception.

2. It is undisputed that these paths were used openly and notoriously for a long period of time. Refused. Covered. Exception.

3. If the jury believe the plaintiff was on the junction of the path at the time of the accident and the paths were openly and notoriously used by the public for many years without objection by the Erie Railroad, then the Erie Railroad owed a duty of reasonable care in the operation of its railroad to the plaintiff at that time. Refused. Covered. Exception.

4. If they believe there was no proper inspection made or that defendant's employees were careless and negligent in their inspection of the train in question on the night of the accident and under such circumstances permitted said train to operate with a swinging door or unusual projection, then in that event it is for the jury to decide if the defendant failed to exercise reasonable care and was negligent. Refused. Covered. Exception.

5. The test of contributory negligence is whether in the opinion of the jury the plaintiff acted as a reasonably prudent man would have acted under all the circumstances, at the time of the accident, taking into consideration that [fol. 404] the plaintiff was a young man, twenty-nine years of age; that he testified he was long familiar with the pathway and had frequently used it in the past. Refused. Covered. Exception.

6. That if they believe the defendant had negligently permitted a swinging door or other unusual projection to protrude from the side of its train and that the plaintiff had a right to be on the junction of the paths and that he was on such junction at the time of the accident and that the

plaintiff was not guilty of contributory negligence, then they must award to the plaintiff as a verdict the reasonable damages suffered by him as a result of the accident in question. Refused. Exception.

7. That in arriving at the amount of reasonable damages they must award the plaintiff, the plaintiff is entitled to:

(a) The reasonable amount of the loss of earnings he has suffered, is suffering and will suffer in the future throughout his life as a result of the loss of his right arm;

(b) For the pain and suffering he has, is and will suffer;

(c) For the mental anguish he has, is and will suffer throughout his life as a result of the loss of his right arm;

(d) $439.00, the amount of the hospital bills, doctor bills, and medicines, which latter sum has been agreed upon. Refused. Covered. Exception.

[fol. 405] DEFENDANT'S REQUESTS TO CHARGE

1. The plaintiff has not pleaded or proven that the defendant was guilty of any wilful or wanton negligence and consequently you are not permitted to give any verdict on any such ground. Refused. Exception.

2. The plaintiff must sustain the burden of proving the defendant's negligence and unless you are satisfied by a fair preponderance of the evidence which you believe, that the defendant did not exercise reasonable care, your verdict must be for the defendant. Refused. Exception.

3. If the evidence on the issue of negligence is evenly balanced in your minds, the plaintiff cannot recover. So charged.

4. If you should decide either that the plaintiff was not struck by the door of a freight car or that the defendant did not know and in the exercise of reasonable care should not have known that the door of one of the freight cars was open, your verdict must be for the defendant. So charged.

5. If you find that the plaintiff was negligent in any respect whatsoever, he cannot succeed in this action. Refused. Exception.

6. If you find that the plaintiff knew or should have known that it was dangerous to walk alongside this moving train in the darkness at the time and in the place here involved, he was negligent and cannot recover. Refused. Covered. Exception.

[fol. 406] 7. If you find that the plaintiff's version of the occurrence and cause of this accident at any time was substantially different from the one he testified to, you should take that into consideration in determining which, if any, version was correct. So charged.

8. A railroad track is a place of danger and anyone walking alongside it in the darkness and aware of the approach of a train must use reasonable care to keep at a safe distance from such train. So charged.

9. If you find that the so-called footpath ran substantially along the edge of the ties and was about two feet wide, I charge you as a matter of law that the overhang of the engine and the widest freight cars on this train were such that no one could walk out on that path alongside of this moving train with safety. Refused. Exception.

10. If you find that the so-called footpath ran substantially along the edge of the ties and was about two feet wide, I charge you as a matter of law that the plaintiff was in a dangerous position when the engine and cars passed him and if he knew or should have known that situation he was duty-bound to get out of the way. Refused. Exception.

11. The defendant was only bound to use reasonable care in the inspection of its trains and is not liable for any defects that may have existed which could not have been discovered in the exercise of such reasonable care. So charged.

[fol. 407] New York, October 13, 1936, 10.30 a. m.

CHARGE OF THE COURT

(MANDELBAUM, D. J.):

The Court: Gentlemen, you have heard the evidence in the case and the arguments of counsel, and the case now ap-

proaches the stage where I am to charge you and then you will deliberate as to your verdict.

This action is brought by the plaintiff to recover damages from the defendant for personal injuries which he asserts he sustained in an accident on the 27th day of July, 1934, at about two-thirty a. m. while he was lawfully on a footpath about two feet wide extending between the Rock Street grade crossing and Hughes Street, in Hughestown, Pennsylvania, which footpath runs parallel with the defendant's railroad track, separated only by the ends of the railroad ties which extend out about two feet from the rail. Plaintiff testified that he was walking northerly from Rock Street on this footpath towards Hughes Street, where he lived. The plaintiff further claims that this footpath has been used for a long period of time by the public and that the defendant negligently, carelessly and recklessly operated its train so that some dark object about two feet wide and about five or six feet in length, which he believes to have been a swinging door from a reefer or refrigerator car protruding from one of the defendant's cars as the locomotive and several cars passed him, striking him on the right side of the face, causing him to be thrown down and under the wheels of the train, suffering thereby an amputation of his right arm together with other injuries of which he complained.

The defendant, on the other hand, contends that not only [fol. 408] were the cars inspected at Avoca, from whence they started, but were again inspected and tested at Ashley, the point of destination, and that the cars were found to be in good condition, the seals on the reefers or refrigerator cars intact and unbroken and no projection protruding from any of the 38 cars making up this so-called Ashley Special. It also contends that the plaintiff, by his own negligence in not stepping away from the train when he saw the train approaching and *and* in not using traversable territory west of the track so as to avoid being struck by the overhanging of cars *of* any other possible accident, was the direct cause of this accident and that therefore the defendant should not be held liable or responsive in damages.

Under the law in this case the burden of proof is upon the plaintiff to establish by a fair preponderance of the credible evidence that the proximate cause of the accident was the negligence of the defendant in the operation of its train on the occasion of the accident by permitting or causing a door

of a reefer or refrigerator car to remain open and swinging so as to strike the plaintiff, as alleged.

If he fails to show this by a fair preponderance of the evidence, the defendant is entitled to a verdict at your hands.

I charge you that when I mention some of the facts I merely call them to your attention to refresh your recollection. You are to find the facts from the evidence given by the witnesses and by the exhibits in the case, according to your recollection of it. You are, however, to accept my rulings on the law in this case as I believe it to be.

The plaintiff testifies that on the night in question while on the footpath he heard the whistle and sound of the bell of the train and saw the headlight of the locomotive. You [fol. 409] must therefore eliminate from your consideration any question of proper signals or warnings of the train's approach to the Rock Street crossing. Plaintiff claims that the train was going between 30 and 35 miles per hour. The defendant's witnesses dispute this claim, contending that the train could not have made more than 10 miles per hour. I charge on this phase of the case that it is for you to determine from the credible evidence in this case the probable speed that this train was making at the time of the accident.

The plaintiff offered testimony by several witnesses relative to this footpath to the effect that it had become a lawful, well-beaten path used by people in the vicinity over a long period of time as a pathway between Rock and Hughes Streets and which joined another pathway going west from Hughes Street; that this footpath was used to the exclusion of the section of ground extending about 25 feet or more from the edge of the pathway to the picket fence for the reason that this section was composed of rough and sloping ground and was therefore not used by anyone.

I charge you that permission or a license to pass over the beaten path owned by the defendant over which the plaintiff claims to have walked may be expressly or impliedly created by constant use over a long period of time where there has been no objection to the use of the same on the part of the owner. It is for you to determine from the credible evidence and all the surrounding circumstances whether, in this case, such permission or license has been expressly or impliedly given to the inhabitants of that vicinity and to this plaintiff to so use this footpath. If you find from all the evidence and exhibits that a right-of-way over the footpath was created, [fol. 410] then it was incumbent upon the defendant to use

reasonable care and take such precaution in the maintenance and operation of its trains so as to avoid injuring the plaintiff.

The defendant, in support of its contention that no reefer or refrigerator car door was left open and swinging from the so-called Ashley Special has submitted testimony by several employees of the Jersey Central Railroad who received the so-called Ashley Special at Ashley, who testified in what manner the cars were sealed, checked and examined for defects, as well as the condition of the 38 cars when they arrived in Ashley. It also submitted testimony by its own employees who similarly explained what precautions were taken; how the cars were examined and the condition of the cars at the time that they left Avoca.

It is from this testimony and all the surrounding circumstances and exhibits in evidence that you are to determine whether or not the defendant's contention that no reefer or refrigerator car doors were left open or swinging from the Ashley Special is to be accepted by you.

If the plaintiff has satisfied you by a fair preponderance of the evidence as to the defendant's negligence, the defendant in order to avoid liability must establish by a fair preponderance of the credible evidence that the plaintiff, Tompkins, was himself guilty of some negligence which either caused or contributed to this accident. If you so find, the defendant is entitled to a verdict regardless of whether the defendant itself was guilty of any negligence.

The defendant in seeking to avoid liability apparently proceeds on two theories; the first, that the plaintiff was a [fol. 411] trespasser and, second, that even if not, the plaintiff himself was negligent in some manner and in some manner contributed to the accident.

The defendant attempted to elicit both from the plaintiff and his witnesses as well as from its own witnesses that the so-called pathway had not assumed the characteristics of a right-of-way. It contended, that is, the railroad company, the defendant,—contended that the territory from the pathway to the picket fence was used by people in the vicinity; that it was not in a dangerous condition, and that if the plaintiff had used such ground the accident could not have happened. It further claims that the plaintiff, while on the pathway, should have stepped aside at the approach of the train so as to avoid any accident, and by failing to do so the plaintiff alone must assume the responsibility of the acci-

dent. I have previously charged you with respect to this pathway that a right-of-way may be created by long usage, and that if you so find the defendant owed the plaintiff the duty of exercising reasonable care in the maintenance and operation of its trains so as to prevent injuring the plaintiff.

It is, however, incumbent upon me to charge in this regard that if you find from all the evidence and surrounding circumstances that such a right-of-way of a footpath was not created, then the plaintiff was merely a trespasser and the defendant did not owe him the duty of exercising reasonable care except that the defendant is charged with not wilfully or wantonly injuring him.

So that if you find by a fair preponderance of the evidence that the plaintiff was a trespasser and that the defendant did not wilfully and wantonly injure him, you must find [fol. 412] for the defendant. If you decide upon all the evidence in the case that the plaintiff has established his right to use the footpath and that the defendant failed to exercise reasonable care in connection with the operation of its trains, you must then further consider the question of whether or not the plaintiff in anywise contributed to the accident.

He, the plaintiff, claims through his own testimony and that of his other witnesses that the ground between the picket fence and the pathway was rough, sloping and unlevel and contained a ditch or drain, making it dangerous to traverse that ground and that no one in that vicinity ever used it. It is for you to determine from all the evidence and exhibits in this case whether this condition of which the plaintiff complains existed at the time of the accident.

In determining whether the plaintiff was negligent or, in other words, whether he in some manner contributed to the accident, you must determine whether the plaintiff, under the circumstances in which he found himself, exercised the care of a reasonably prudent person. This you must determine from all the surrounding circumstances and evidence in the case.

During the course of my instructions to you I have repeatedly used the expression "fair preponderance of evidence." What do those words mean? By a fair preponderance of the evidence you are not to understand that it necessarily means the number of witnesses who go upon the stand to testify. It has reference to the quality rather than to the quantity. This requirement, however, is a substantial one,

and the word "preponderance" indicates its meaning and that there must be more evidence in favor of the plaintiff's [fol. 413] contention that you credit and believe than you find opposed thereto before you can declare a preponderance in his favor.

The same rule applies to the defendant on the issue of the plaintiff's contributory negligence, which the defendant must prove by a fair preponderance of the evidence.

If at the end of your deliberations you are satisfied that the defendant was negligent and that the plaintiff was free from negligence contributing to the accident, then you must pass to the question of damages. On that subject you will find a verdict, if you reach that point, for this plaintiff, that will fully and fairly and reasonably compensate for his pecuniary loss, the loss of time, for the pain and suffering which he endured as the result of this accident, for his expenses incurred in curing himself of his injuries and any expenses that he may incur in the future for curing himself of the injuries as a result of this accident.

You will recall the injuries he received, the operations he underwent, the loss of his arm, the injuries to his face, the time spent in the hospital and all other things in connection with the case which were necessarily and directly the result of this accident. You may consider in fixing the damages the effect on his ability to work on account of the loss of his arm which, of course, is a permanent injury. If the defendant is responsible for his injuries, it should respond in such a sum as will fully compensate him. His medical and hospital bills were, as I recall the testimony, in the sum of about $439.

Mr. Hunt: That is correct, your Honor.

The Court: Plaintiff testified that he had an earning capacity between 1929 and until two months prior to the ac- [fol. 414] cident of the average of about $25 per week. You will find from all the facts what he is reasonably entitled to recover for his injuries if he is entitled to recover, and give him such sum as will fully and fairly compensate him for his injuries.

Let me repeat again that you twelve men are the sole and exclusive judges of the facts. It is your recollection of the evidence as you heard it from the lips of the witnesses that is controlling. As to who is telling the truth, you alone must determine from all the evidence in the case and from the exhibits allowed in evidence. You may take into consideration the manner in which the various witnesses testified; were

they truthful, were they frank or were they evasive and untruthful. You are to take into consideration the interest that any witness may have in the result of the trial. If you find that any witness has wilfully sworn falsely to any material fact, you may disregard that part of his testimony or you may disregard the entire testimony of that particular witness.

In short, it is your duty to examine the testimony of each sworn witness and give it the weight and credit you find it is entitled to after reasoning with each other on all the evidence in the case.

The denial of the motion at the close of the plaintiff's case and the denial of the motion at the close of the entire case are simply decisions on propositions of law which must be passed upon by the court. Such rulings must not be regarded as any indication that either the plaintiff or the defendant is entitled to prevail on the issues of fact. Neither must you be influenced by summations of counsel, no matter how eloquent or positive they may be, because in the last analysis the questions of fact must be determined by the [fol. 415] sworn testimony of the witnesses as you saw them take the stand.

In other words, gentlemen of the jury, both plaintiff and defendant are entitled to a fair and impartial examination of their evidence at your hands, in order that a true and just verdict be arrived at.

REQUESTS TO CHARGE—EXCEPTIONS

Now, gentlemen, the plaintiff and the defendant have submitted certain requests to charge. I will take up the defendant's proposed requests to charge first.

Defendant's first request declined, as I have covered same in my main charge.

Mr. Kiendl: If your Honor please, may I note an exception to those you deny so that I won't have to take them up later on?

The Court: Defendant has an exception. Defendant's second request.

Mr. Kiendl: That is withdrawn, your Honor, as covered by what has already been said.

The Court: Defendant's third request, I so charge, "If the evidence on the issue of negligence is evenly balanced in your minds, the plaintiff cannot recover."

Defendant's fourth request I so charge; that is to say: "If you should decide either that the plaintiff was not struck by the door of a freight car or that the defendant did not know and in the exercise of reasonable care should not have known that the door of one of the freight cars was open, your verdict must be for the defendant."

Mr. Kiendl: The fifth we withdraw, your Honor, as charged already in the main charge.

The Court: Defendant's sixth request declined. I have covered it in my main charge.

Mr. Kiendl: May we have an exception?

[fol. 416] The Court: Yes. Defendant's seventh request I so charge: "If you find that the plaintiff's version of the occurrence and cause of this accident at any time was substantially different from the one he testified to, you should take that into consideration in determining which, if any, version was correct."

Defendant's eighth request, I so charge; that is: "A railroad track is a place of danger and anyone walking alongside it in the darkness and aware of the approach of a train must use reasonable care to keep at a safe distance from such train."

Defendant's ninth request refused.

Mr. Kiendl: Exception.

The Court: The defendant may have an exception. Defendant's tenth request refused. Defendant may have an exception.

Defendant's eleventh request, I so charge; that is to say: "The defendant was only bound to use reasonable care in the inspection of its trains and is not liable for any defects that may have existed which could not have been discovered in the exercise of such reasonable care."

In so far as the plaintiff's requests to charge the jury, plaintiff's request one refused, plaintiff may have an exception; plaintiff's second request refused. I have charged that anyway in my main charge.

Plaintiff's third request refused. Plaintiff may have an exception to each of these refusals.

Plaintiff's fourth request refused.

Plaintiff's fifth request refused as I have covered most of it in my main charge.

Plaintiff's sixth request refused.

Plaintiff's seventh request refused because I think I have covered all these requests in my main charge.

[fol. 417] Now, gentlemen, the case is now in your hands. As to the form of your verdict, if you find for the plaintiff, then you find for the plaintiff in the sum of so much money as you see fit. If you find for the defendant you merely say "Verdict for the defendant."

Mr. Kiendl: If your Honor please, may the defendant have one exception to your main charge?

The Court: Yes.

Mr. Kiendl: To preserve our legal point, we except to that portion of your Honor's main charge wherein you leave to the jury as a question of fact the question of whether or not there was a permissive right on the longitudinal so-called footpath running along a railroad right-of-way in the State of Pennsylvania. That is all I have to say, your Honor.

The Court: You may have an exception.

Mr. Hunt: I have no further request, your Honor.

Mr. Kiendl: May the jury have the exhibits if they want them?

The Court: Yes, surely, if they want them.

(At 12:40 o'clock the jury retired.)

Mr. Kiendl: May I request that if the jury so decide, that they be entitled to see the complaint and the file complaint for discovery and inspection in this case.

Mr. Hunt: And the answer.

Mr. Kiendl: And the answer and the bill of particulars.

The Court: Yes.

Mr. Kiendl: We will send them in.

[fol. 418] Mr. Hunt: Yes.

The Court: Yes.

(At 4:45 o'clock p. m. the jury returned to the court room.)

VERDICT

The Clerk: Gentlemen, have you agreed upon a verdict?

The Foreman: Yes, sir, we have.

The Clerk: How say you?

The Foreman: We find for the plaintiff.

The Clerk: In what amount?

The Foreman: Thirty thousand dollars.

The Clerk: Gentlemen, listen to your verdict as it stands recorded in this issue joined between Harry J. Tompkins against Erie Railroad Company. You say you find a verdict for the plaintiff in the sum of Thirty thousand dollars, and so say you all?

The Foreman: Yes, sir.

MOTION TO SET ASIDE VERDICT

Mr. Kiendl: If your Honor please, the defendant moves to set aside the verdict and for a new trial on the ground the verdict is against the evidence and the weight of evidence and on the exceptions that we have noted throughout the trial, and we call your Honor's attention particularly to the fact that the only court that can review the weight of evidence in our federal jurisdiction is your Honor's court, and it seems to me we have established beyond any doubt that the plaintiff is not entitled to recover anything in this case whatsoever.

The Court: I will reserve decision on that motion.

Mr. Kiendl: Would your Honor desire a brief on the subject?

[fol. 419] The Court: Yes.

Mr. Kiendl: Within, perhaps, a week?

The Court: Well, within ten days, anyhow. A week would be better.

Mr. Kiendl: A week will be all right?

The Court: Yes. If you want to have more time, I think I will oblige you.

Mr. Hunt: May we have an opportunity to answer the brief?

The Court: Yes.

The Clerk: The jury is excused for the term with the thanks of the court.

SEARLE

[fols. 420-421] PLAINTIFF'S EXHIBIT 1

LEONARD

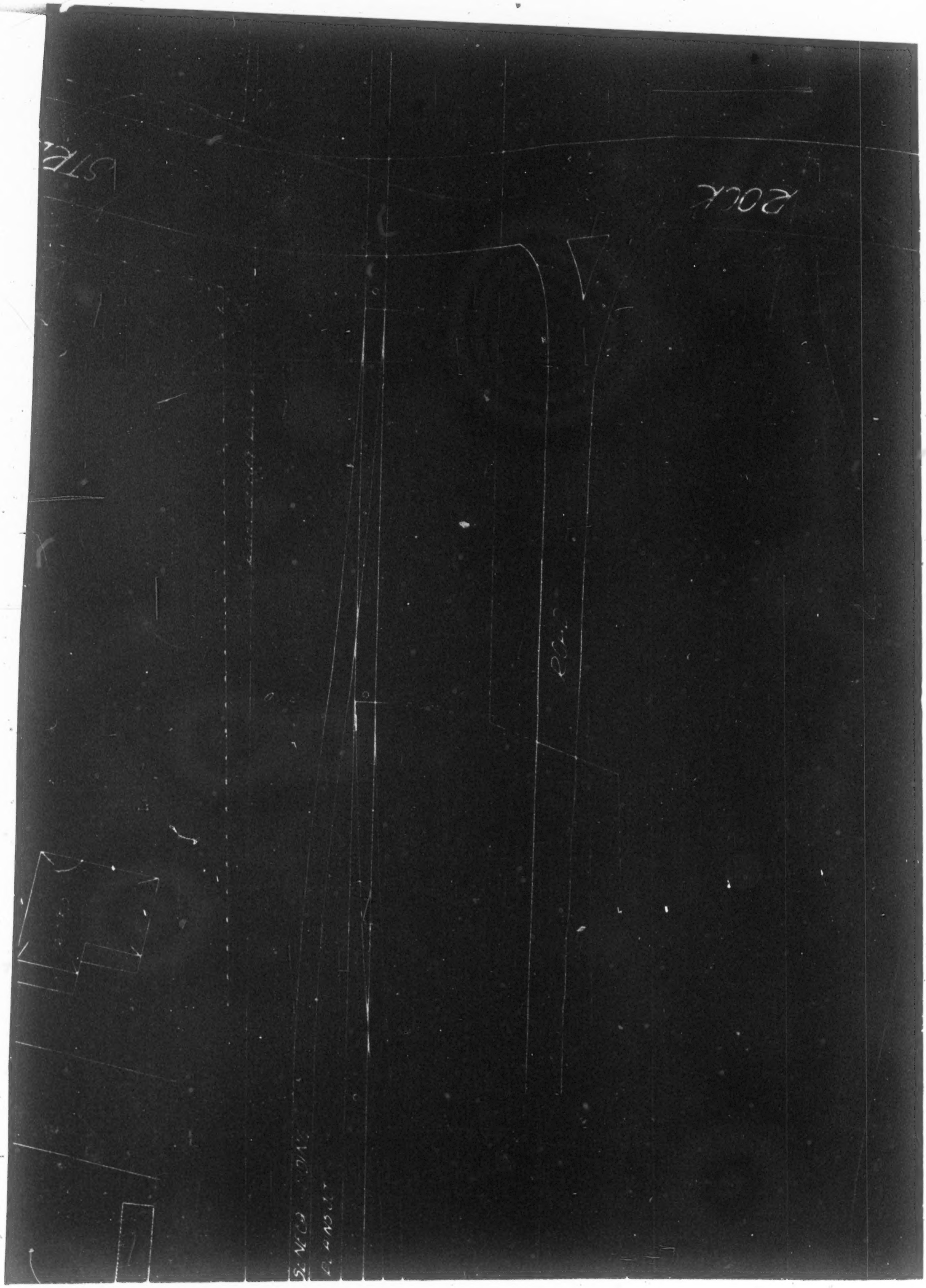
ST

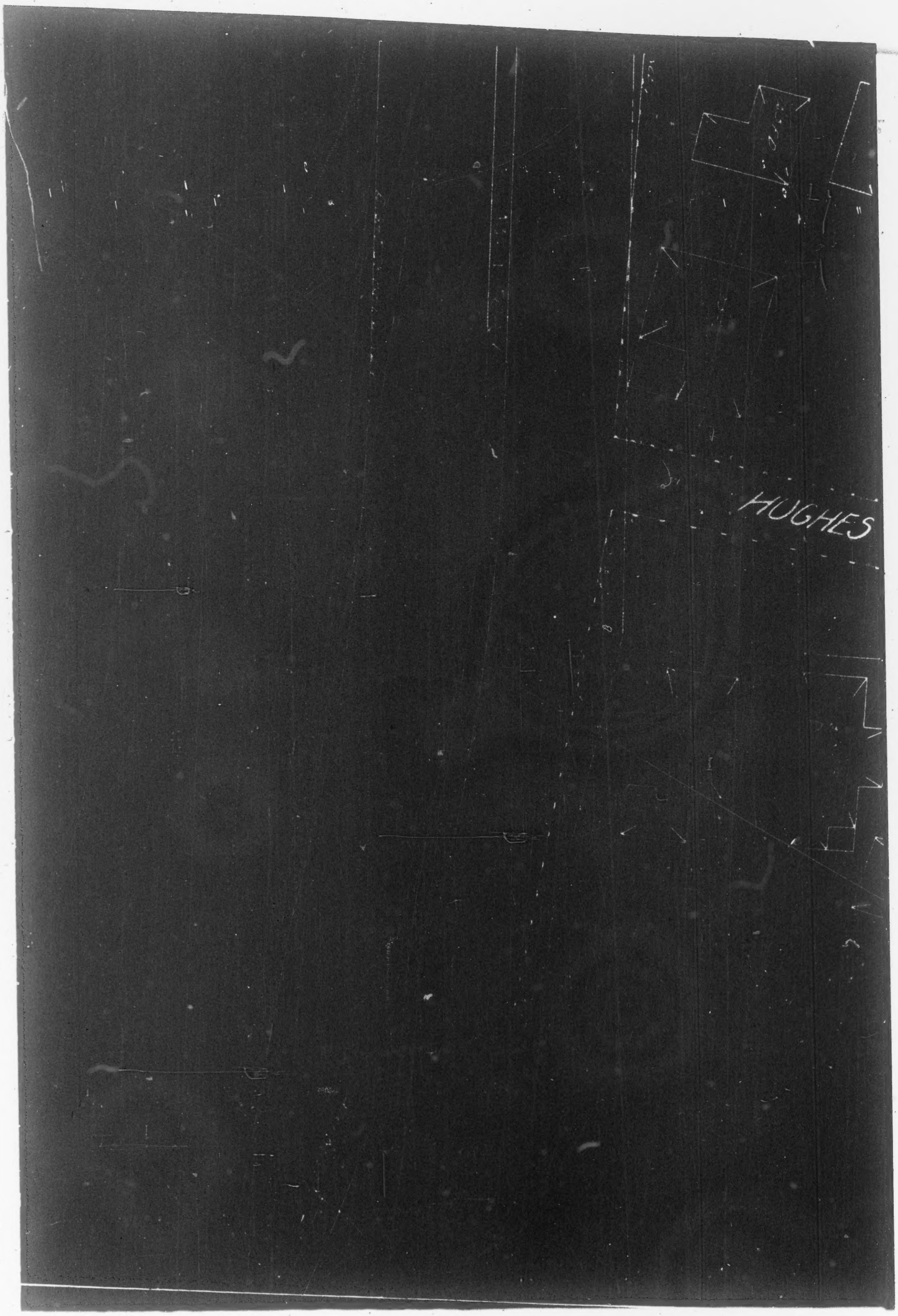
WASHINGTON

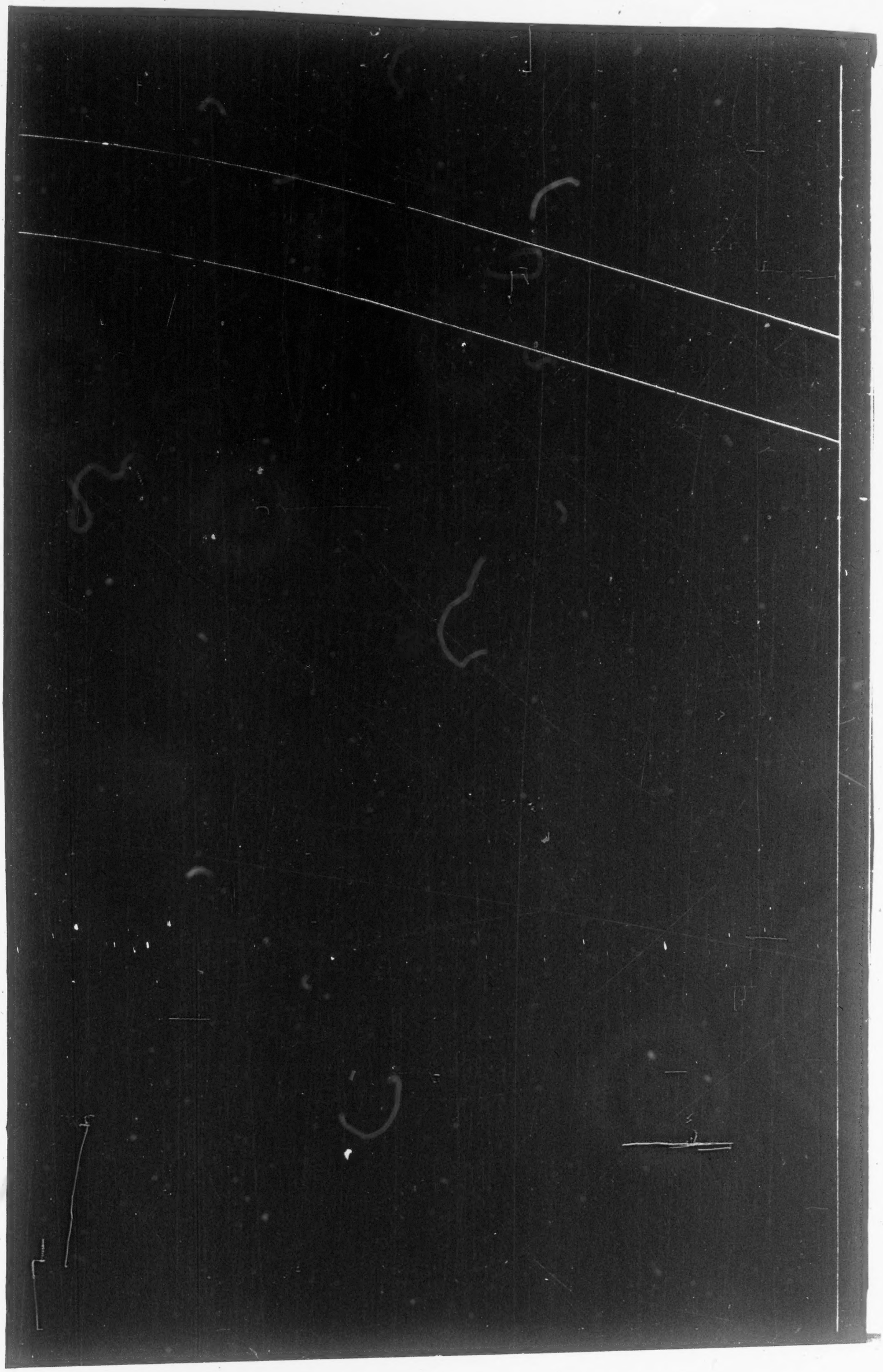
TERRACE

ET

STREET




HUGHES



ERIE RAILROAD COMPANY

EASTERN DISTRICT — WYOMING DIVISION

SITUATION PLAN AT ROCK STREET

HUGHESTOWN, PA.

OFFICE DIVISION ENGINEER — DUNMORE, PA.

SCALE 1"=20' — SEPT 11, 1934

VAL SECT 4 PA — SHEET No 63

MADE BY

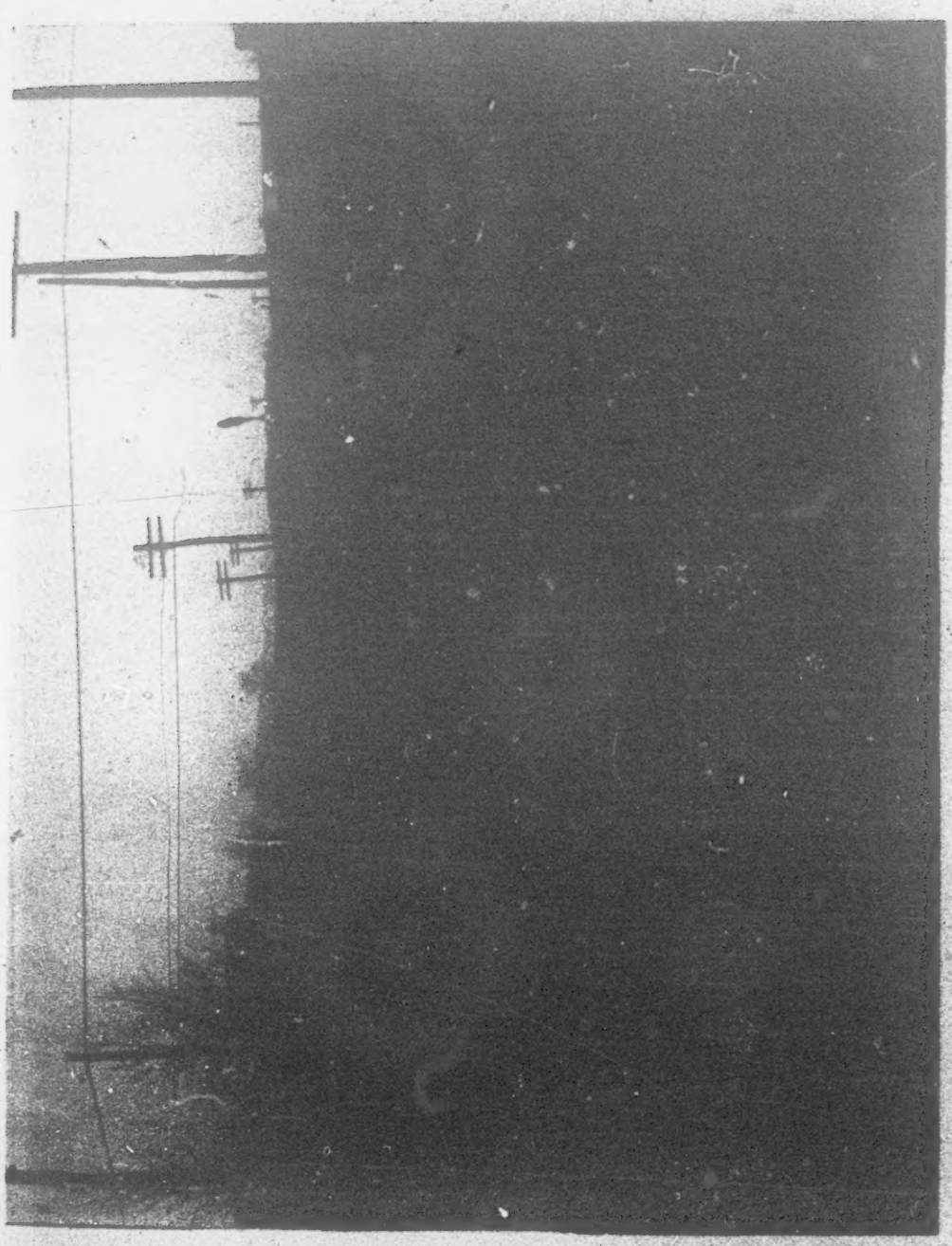
[fols. 422-423] PLAINTIFF'S EXHIBIT 2

Photograph taken with camera 50 feet west of crossing and 150 feet from point of accident, looking east.

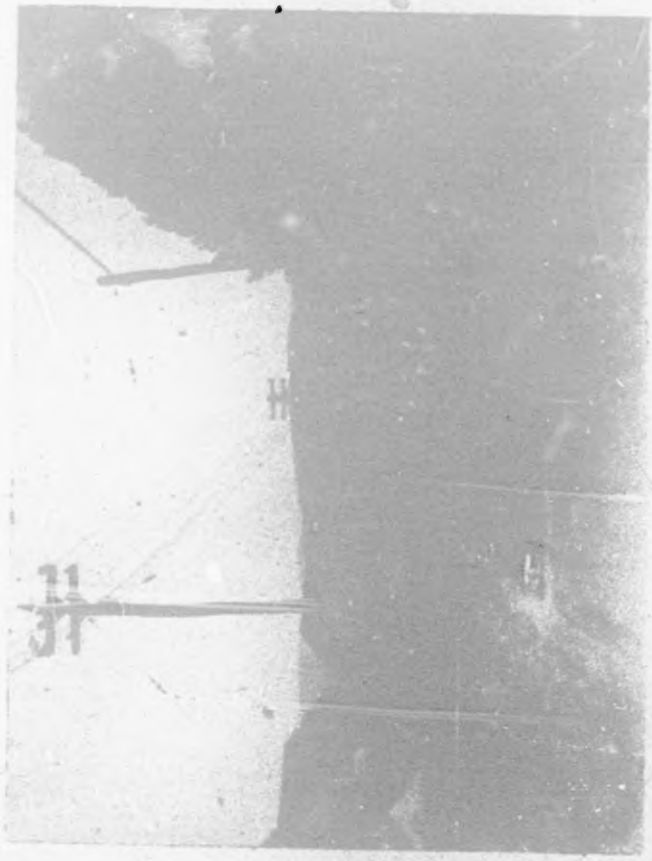
[fols. 424-425] PLAINTIFF'S EXHIBIT 3

Photograph taken with camera 100 feet east from point of accident, looking west.

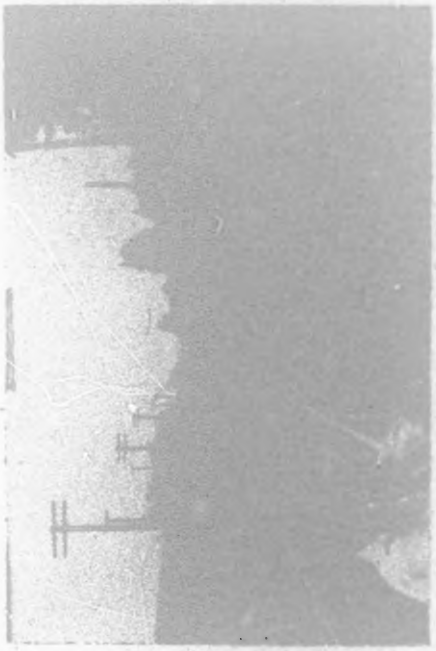
[fols. 436-437] DEFENDANT'S EXHIBIT B



[fols. 426-427] PLAINTIFF'S EXHIBIT 4



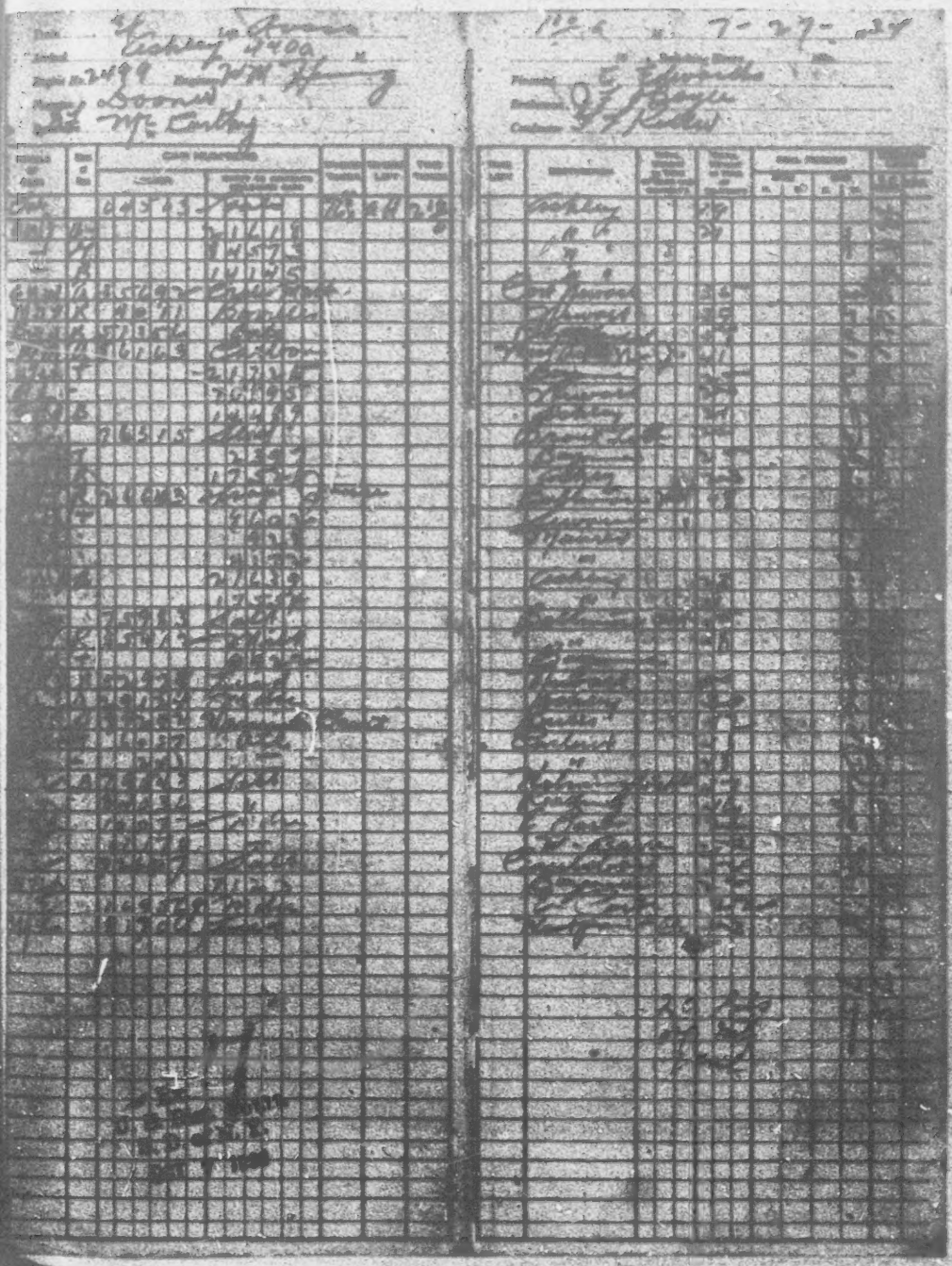
[Vols. 428-429] PLAINTIFF'S EXHIBIT 5



[fols. 430-431] PLAINTIFF'S EXHIBIT 6

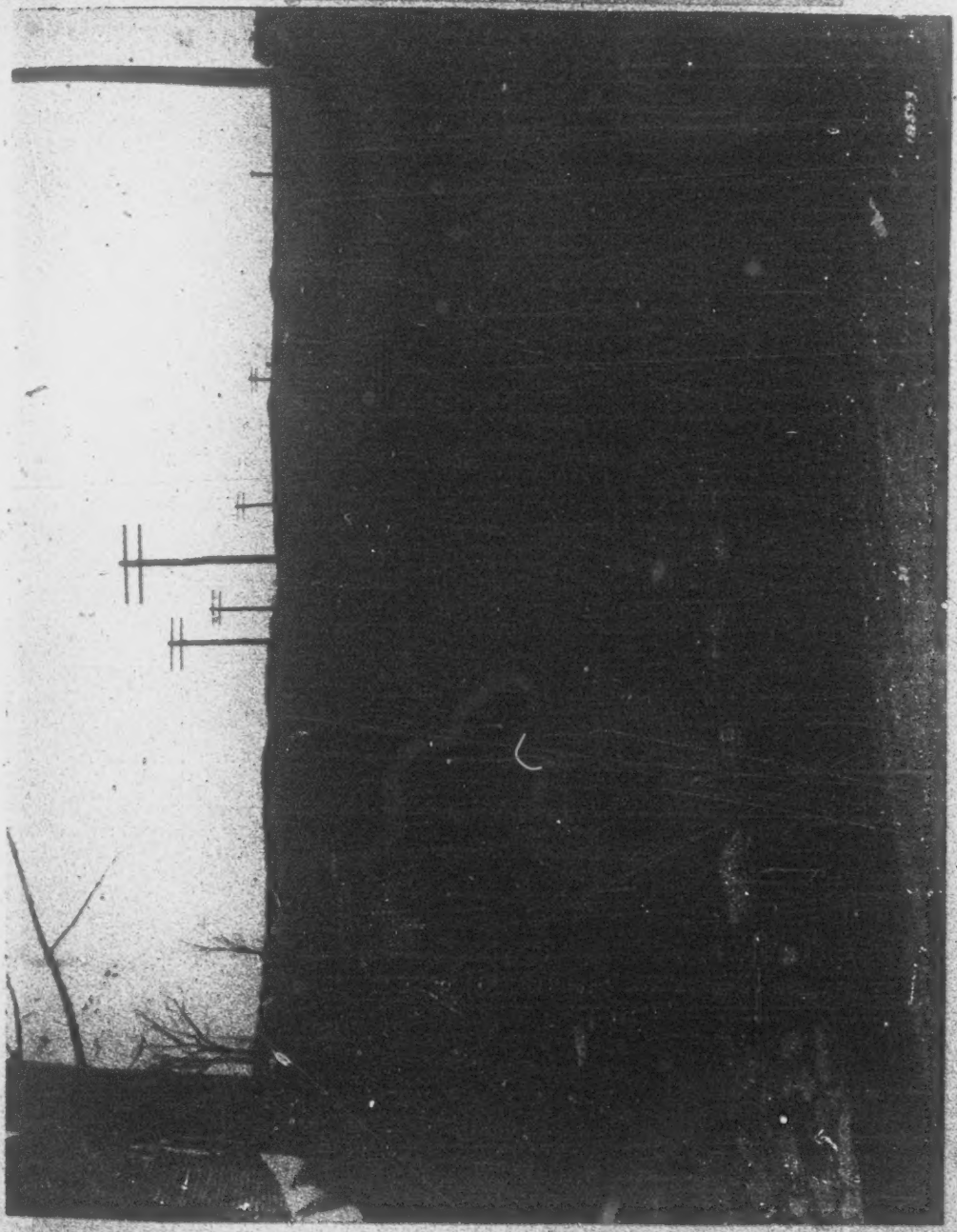
[fols. 432-433] PLAINTIFF'S EXHIBIT 7

Page from conductor's train book 7/27/34



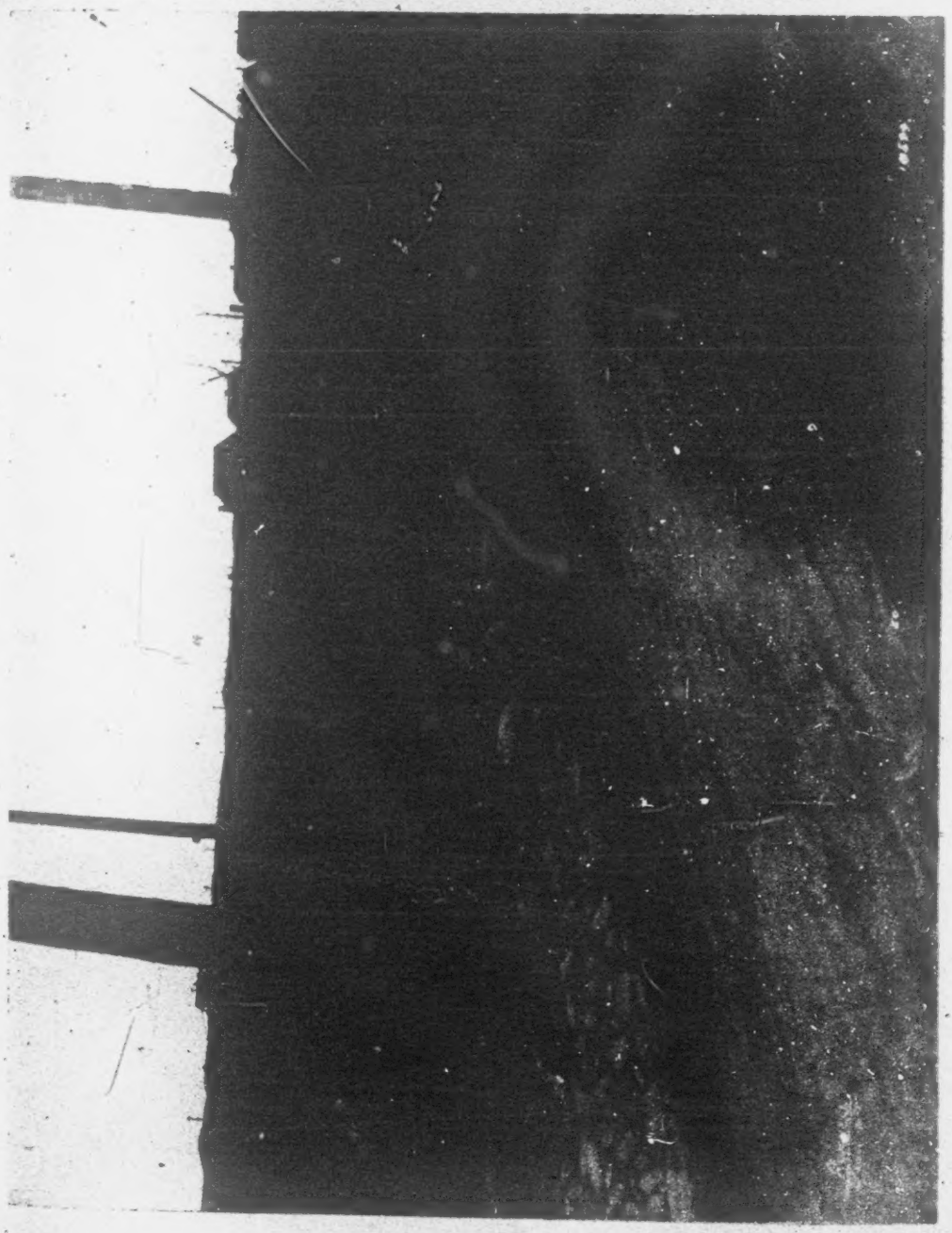
[fols. 444-445] Defendant's Exhibit C—Continued

Photograph taken with camera over center of Rock Street, 35 feet north from near rail looking east.

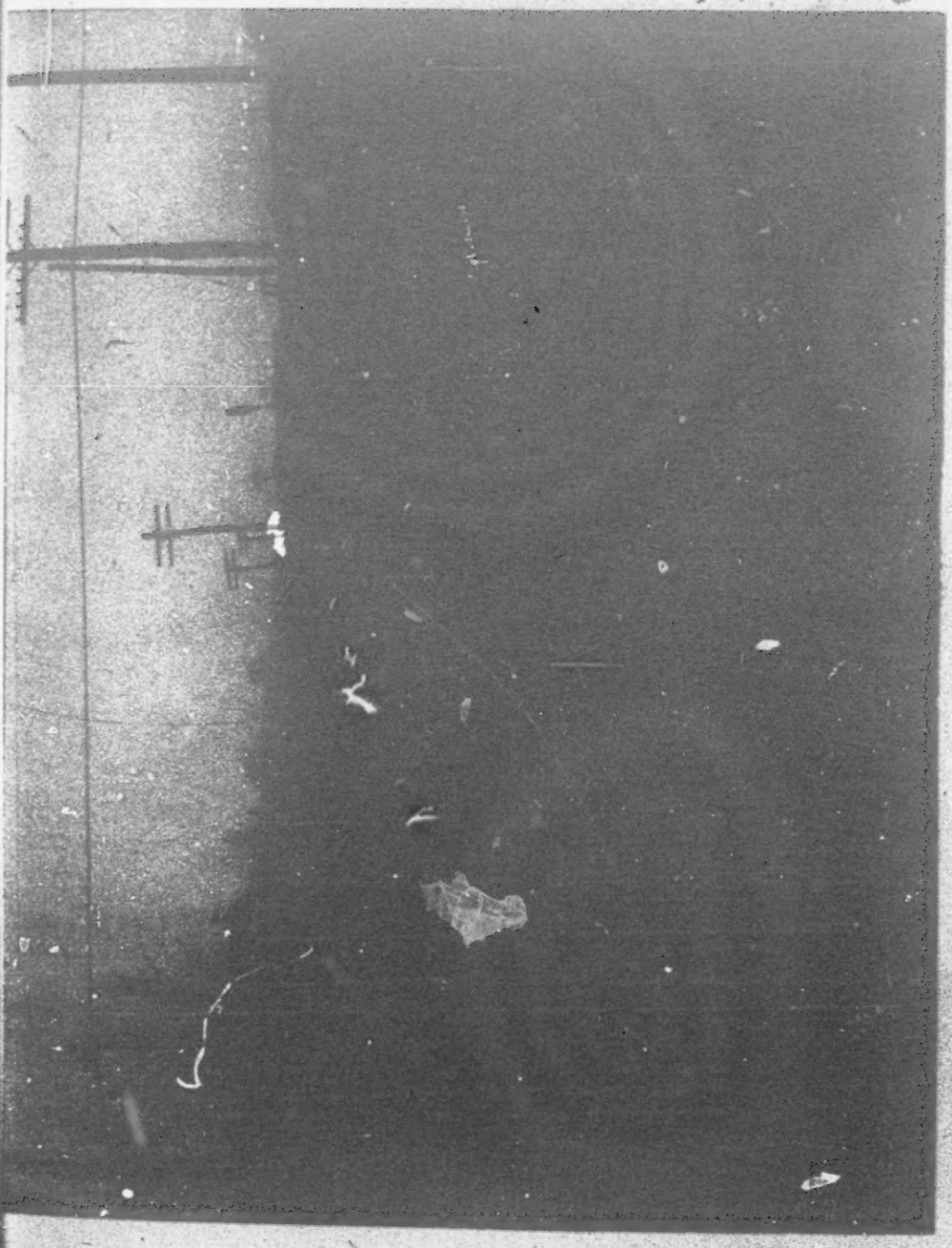


[fols. 446-447] Defendant's Exhibit C—Continued

Photograph taken with camera over center of Rock Street, 50 feet north from near rail, looking east.

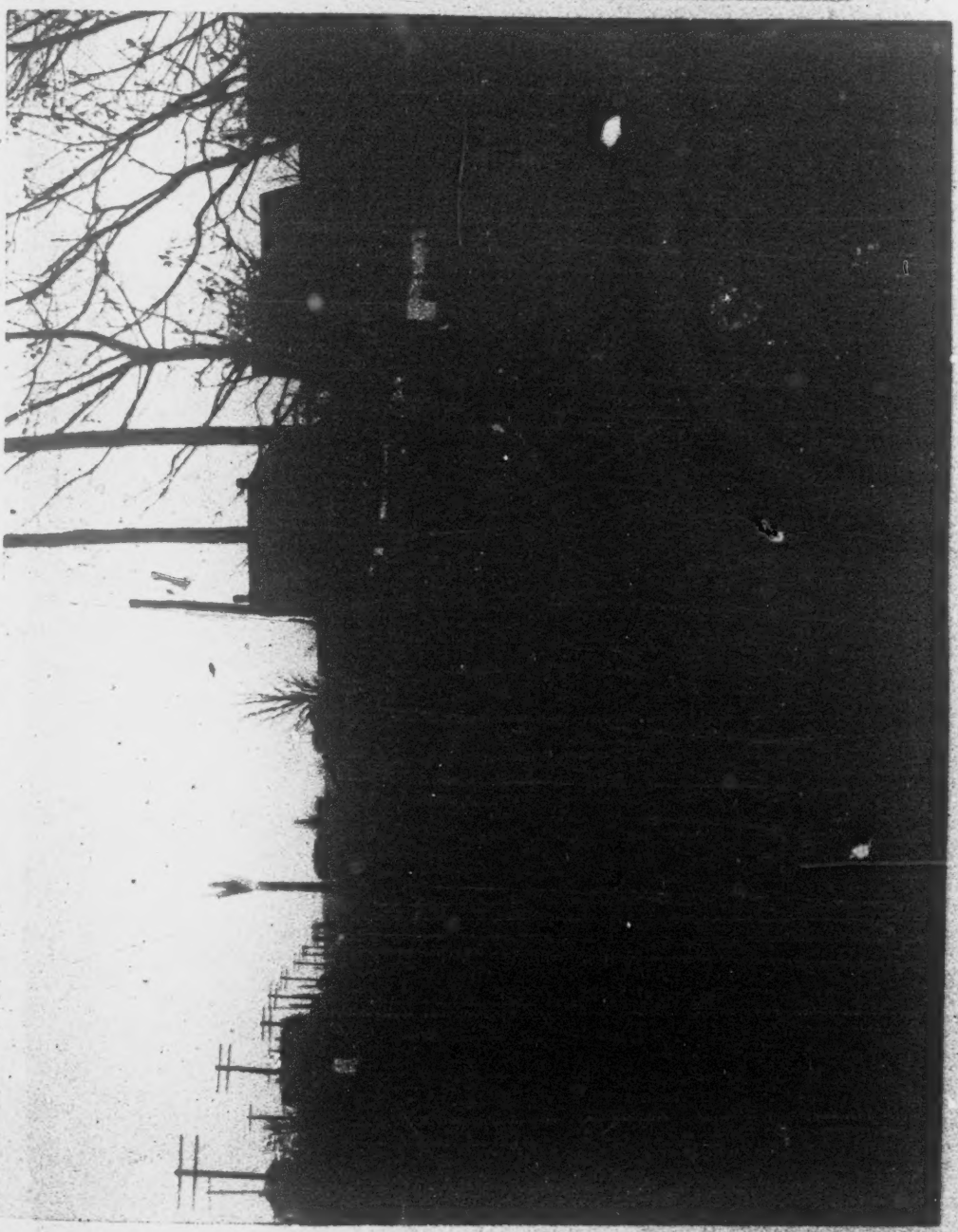


[fol. 434-435] DEFENDANT'S EXHIBIT A



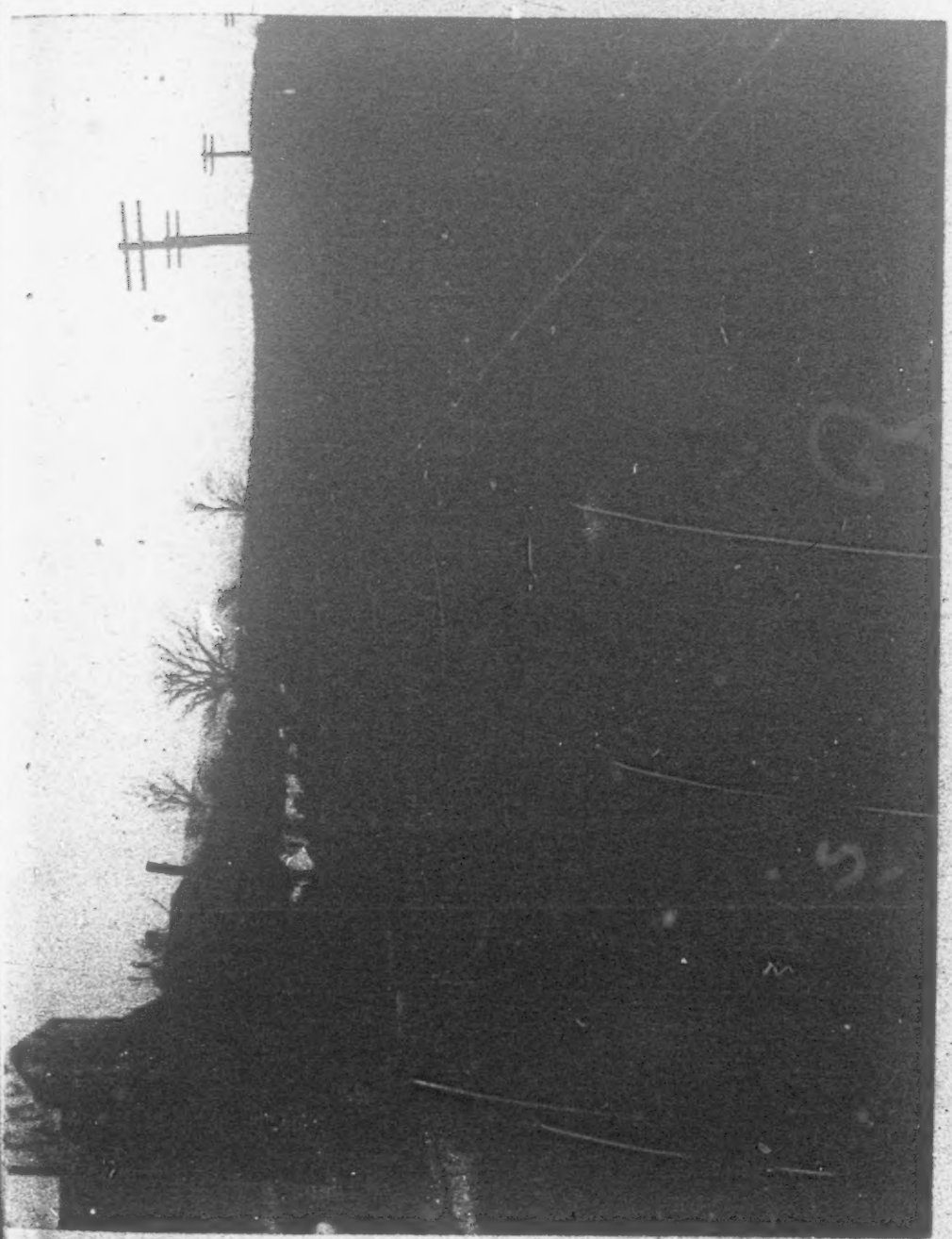
[fols. 448-449] Defendant's Exhibit C—Continued

Photograph taken with camera 20 feet north from near rail and about 75 feet east from center of Rock Street; looking west.

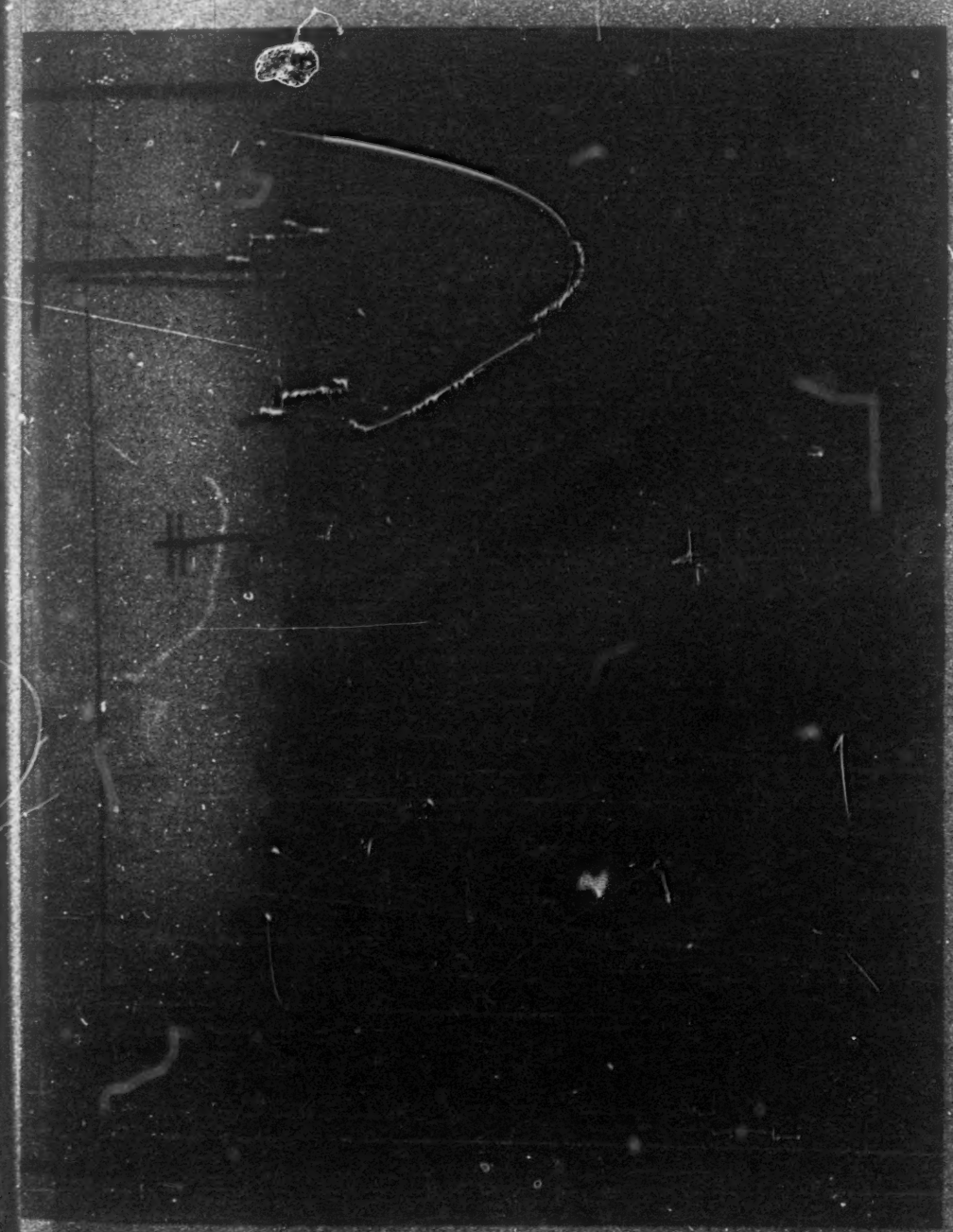


[fols. 438-439] DEFENDANT'S EXHIBIT C.

Photograph taken with camera over center of Rock Street, 5 feet north from near rail, looking east.

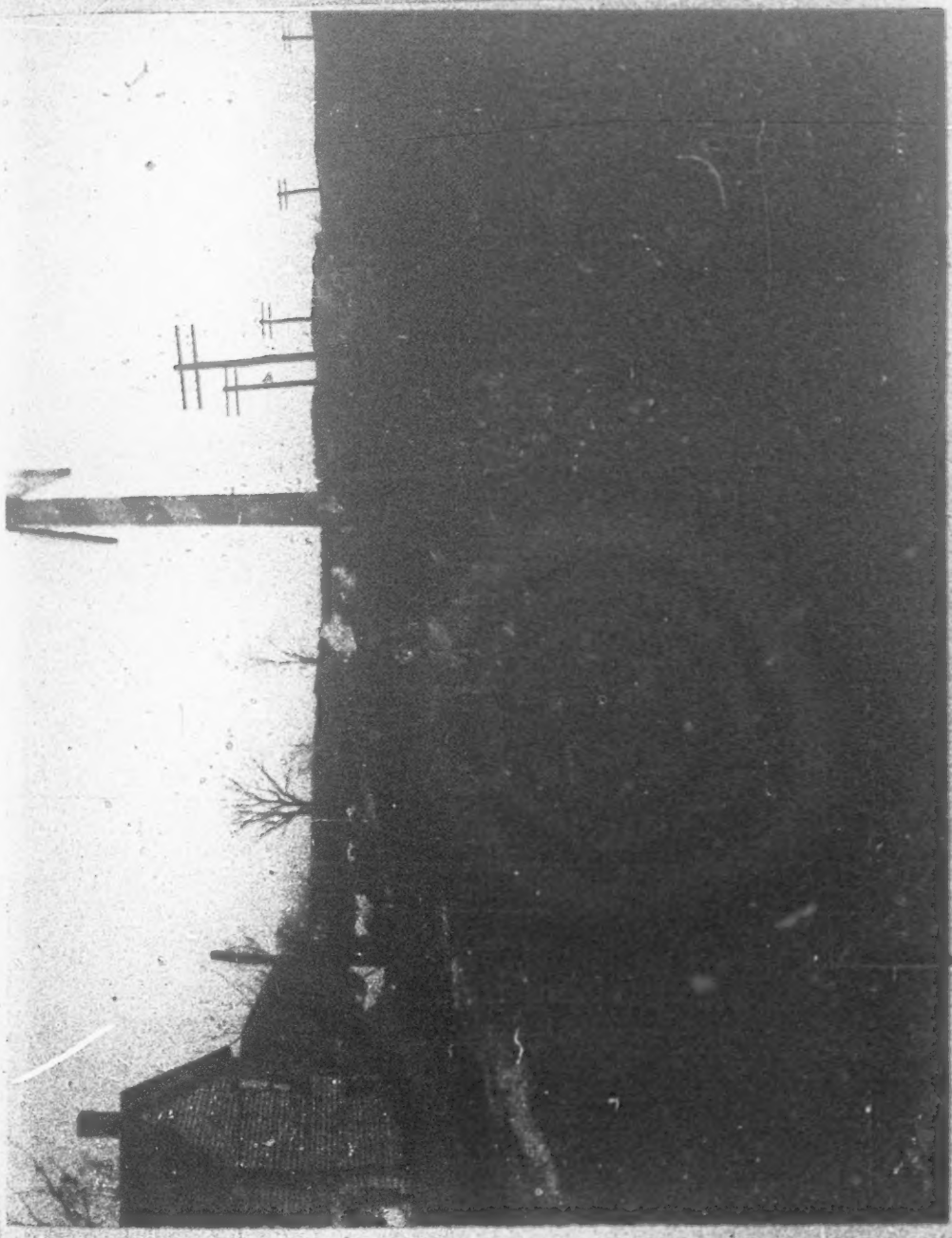


[fols. 450-451] DEFENDANT'S EXHIBIT D



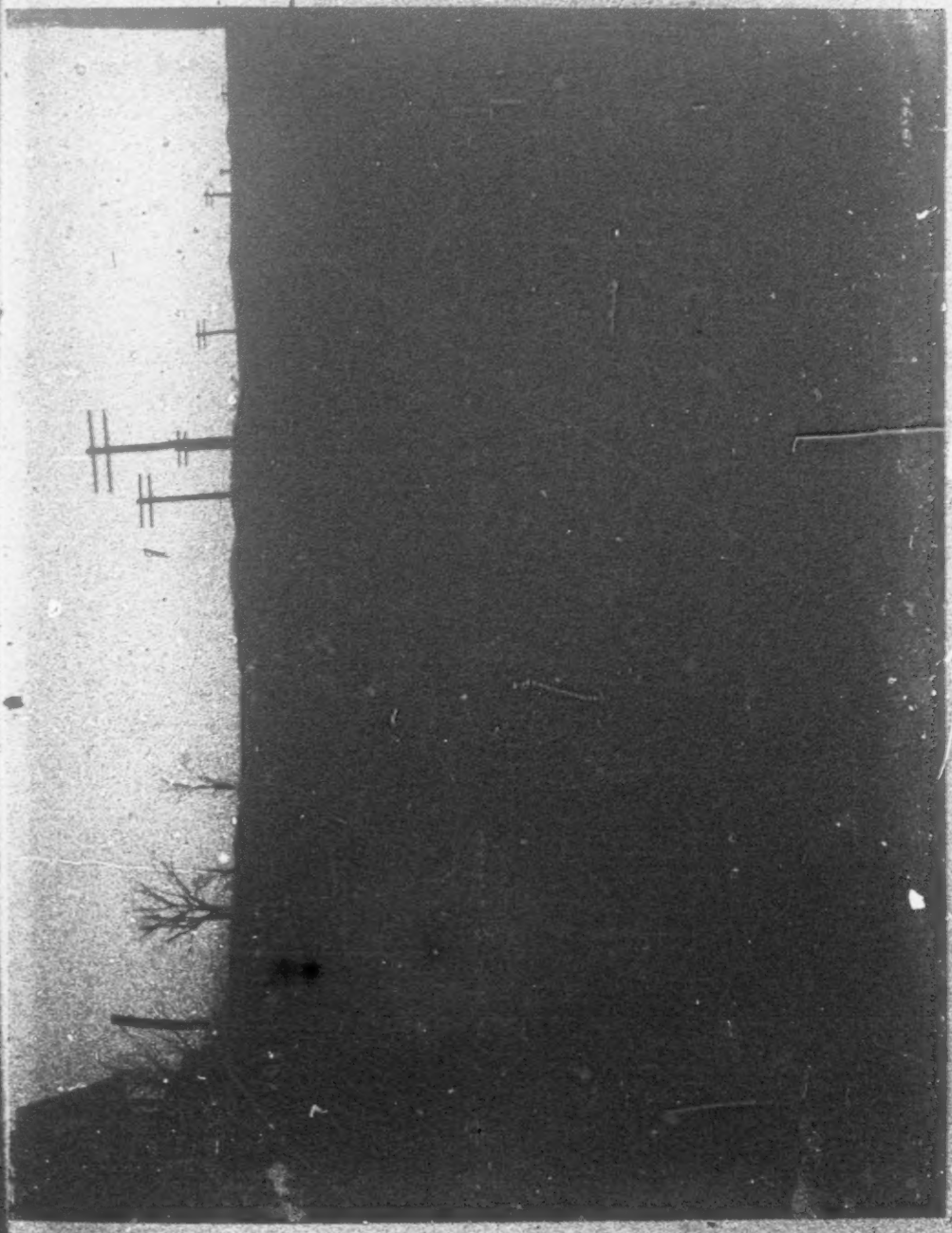
[fols. 440-441] Defendant's Exhibit C—Continued

Photograph taken with camera over center of Rock Street, 15 feet north from near rail, looking east.

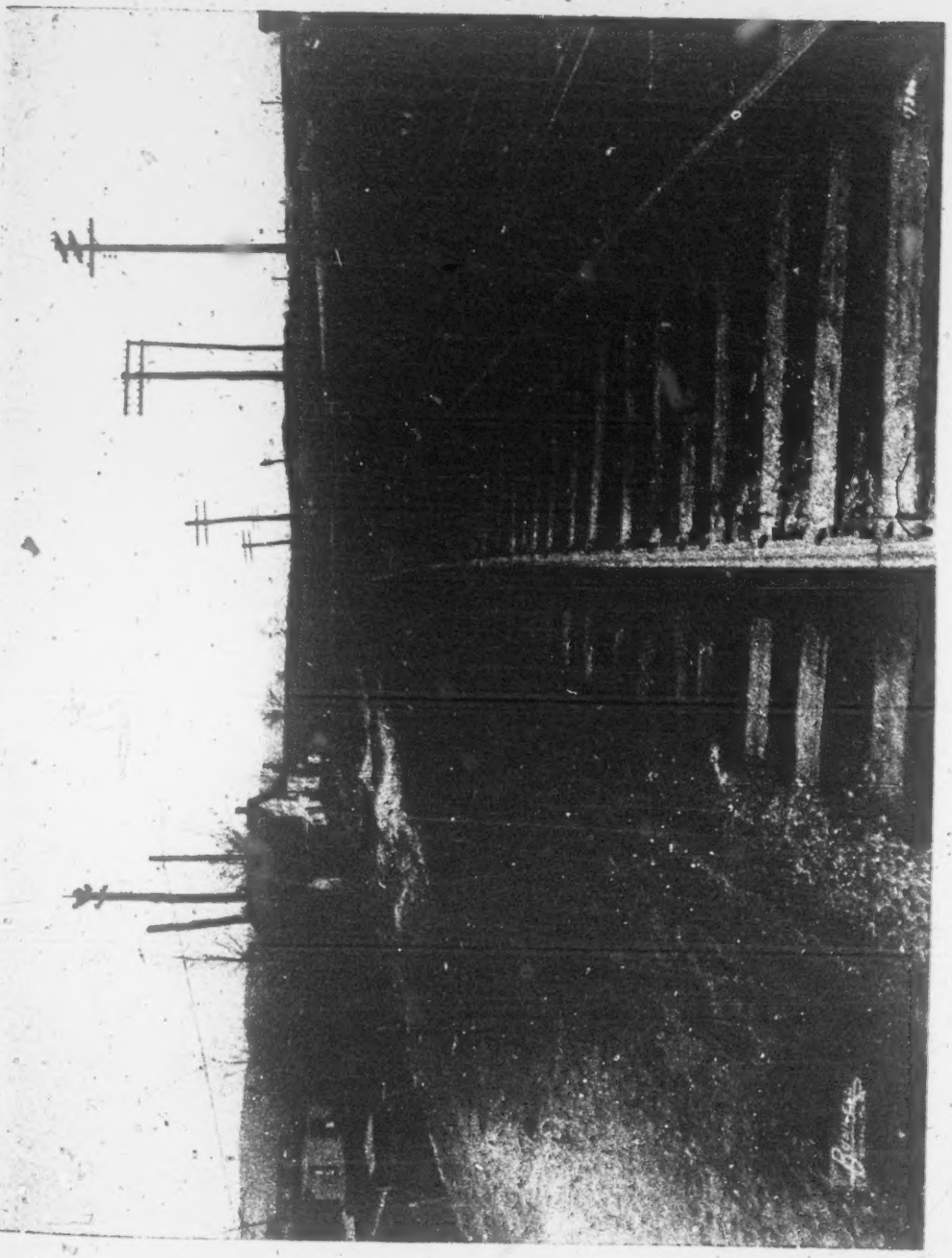


[fols. 442-443] Defendant's Exhibit C—Continued

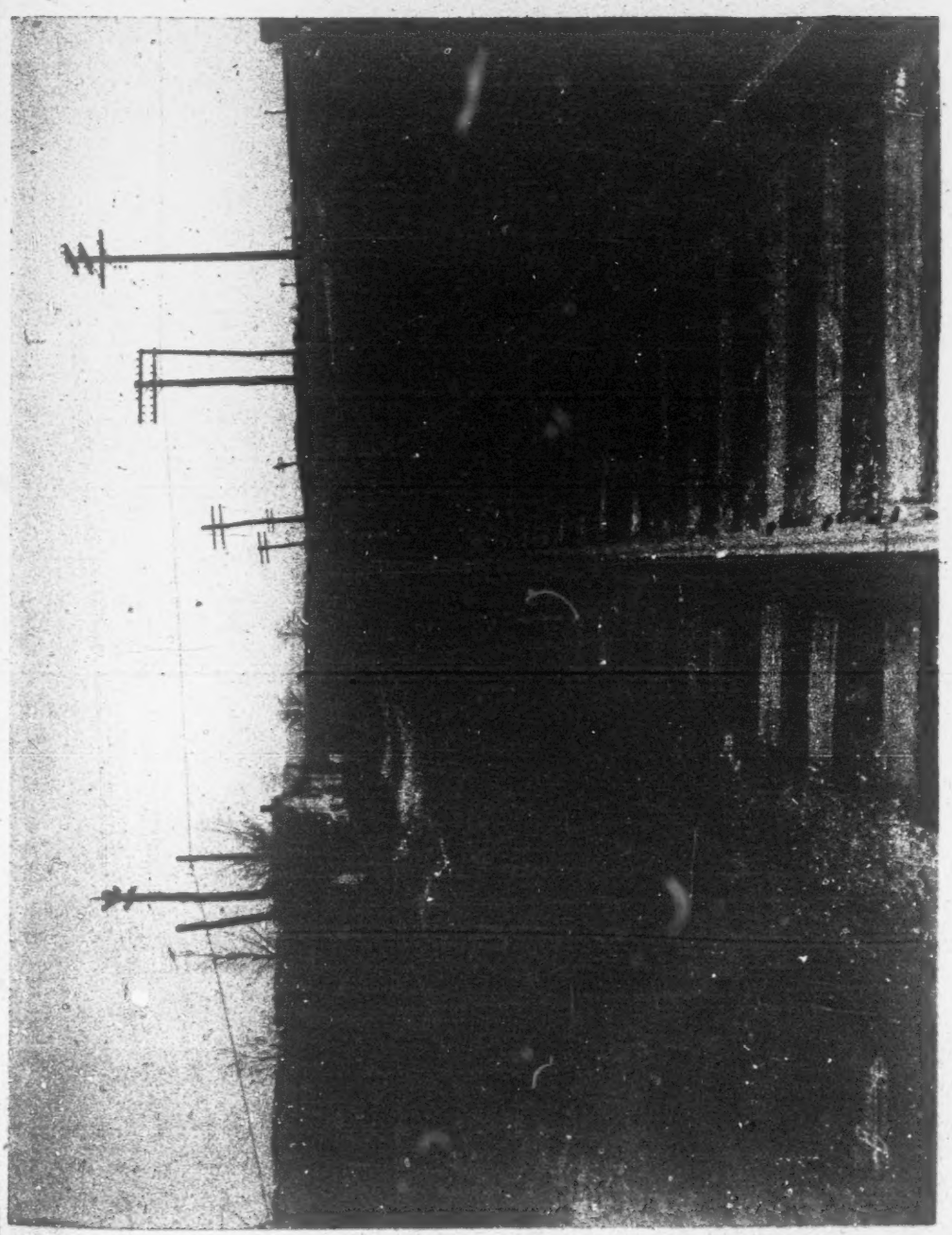
Photograph taken with camera over center of Rock Street, 25 feet north from near rail, looking east.



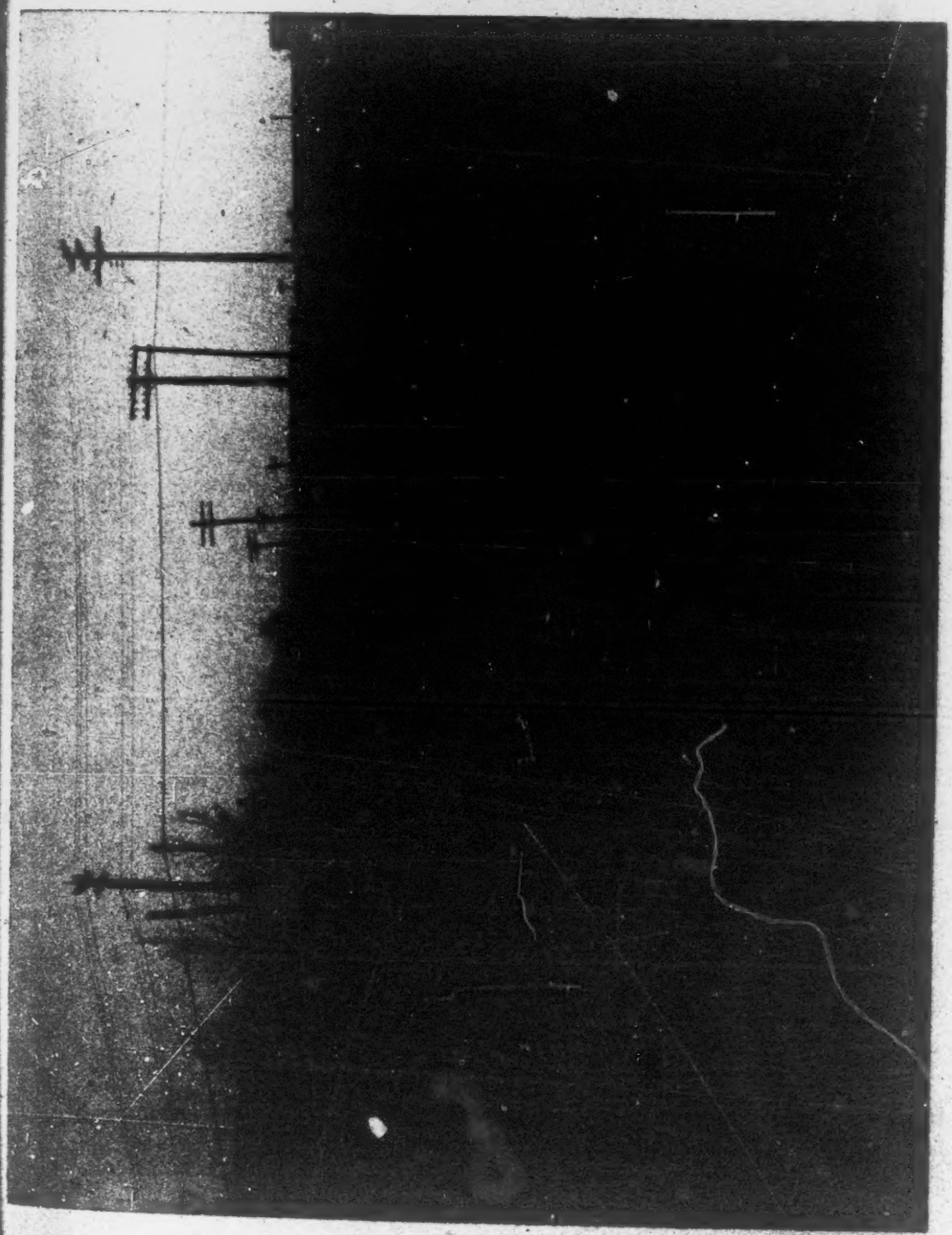
[fols. 456-457] Defendant's Exhibit D—Continued



[fols. 458-459] Defendant's Exhibit D—Continued

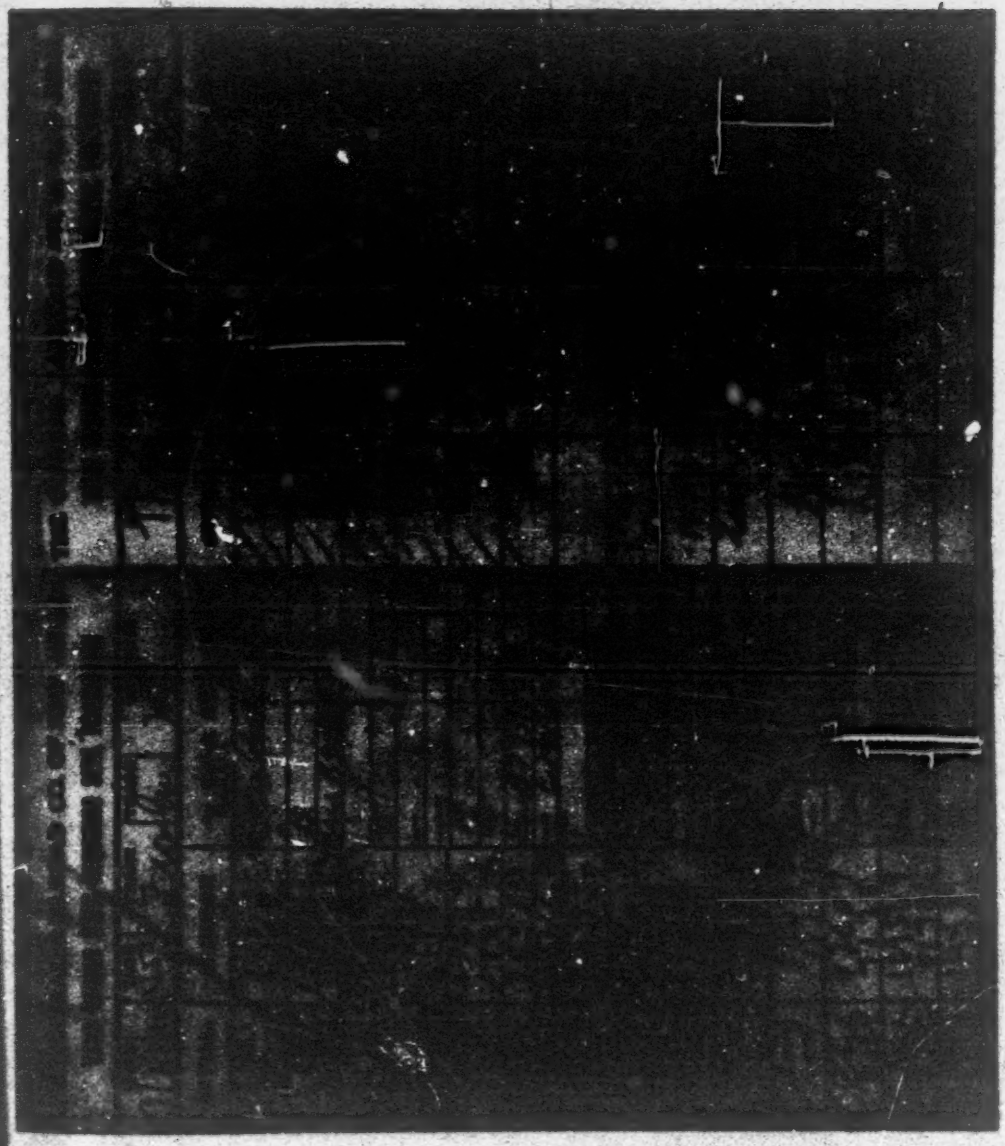


[fols. 460-461] Defendant's Exhibit D—Continued



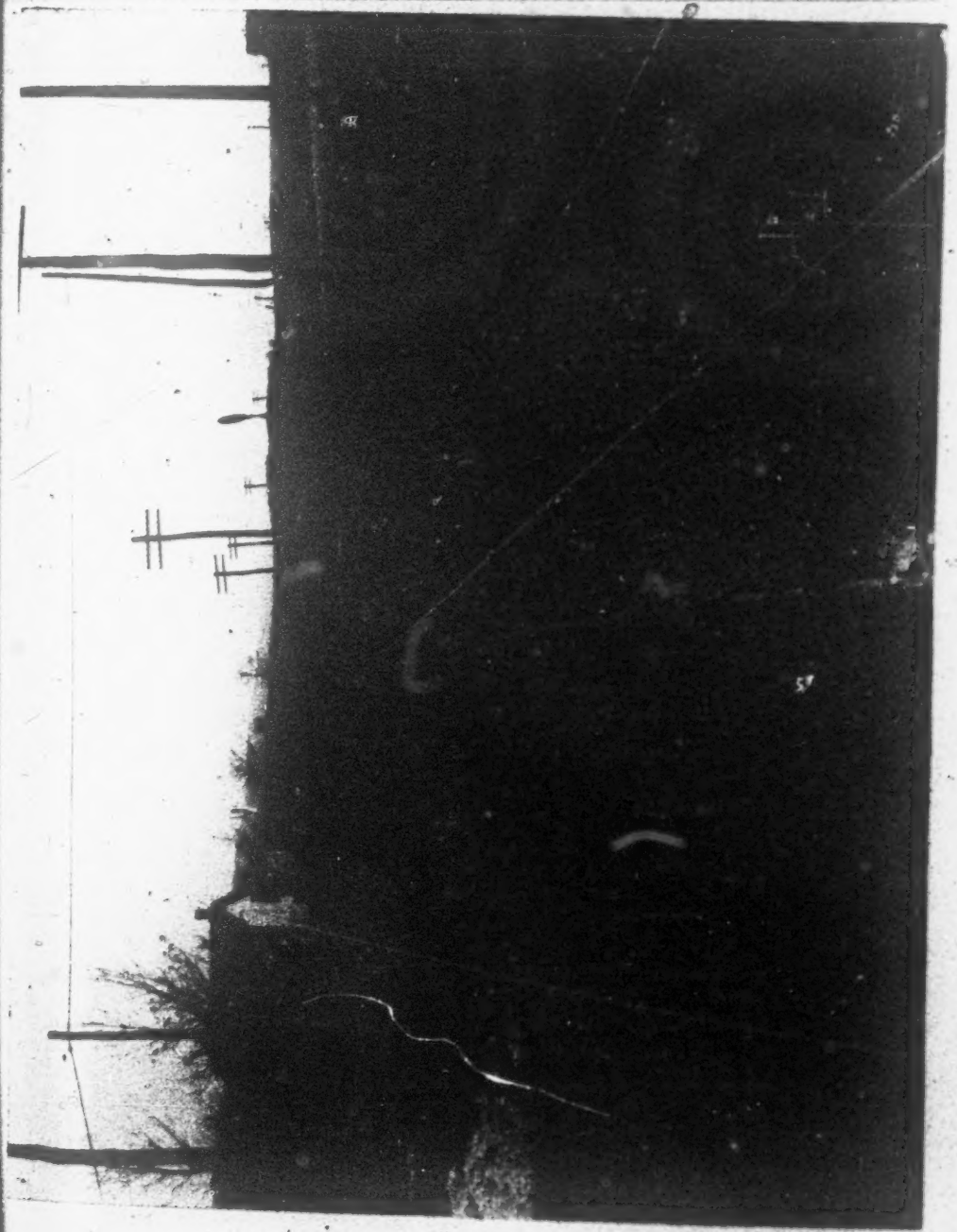
[fols. 462-463] DEFENDANT'S EXHIBIT E

Seal Records



[fols. 452-453] Defendant's Exhibit D—Continued

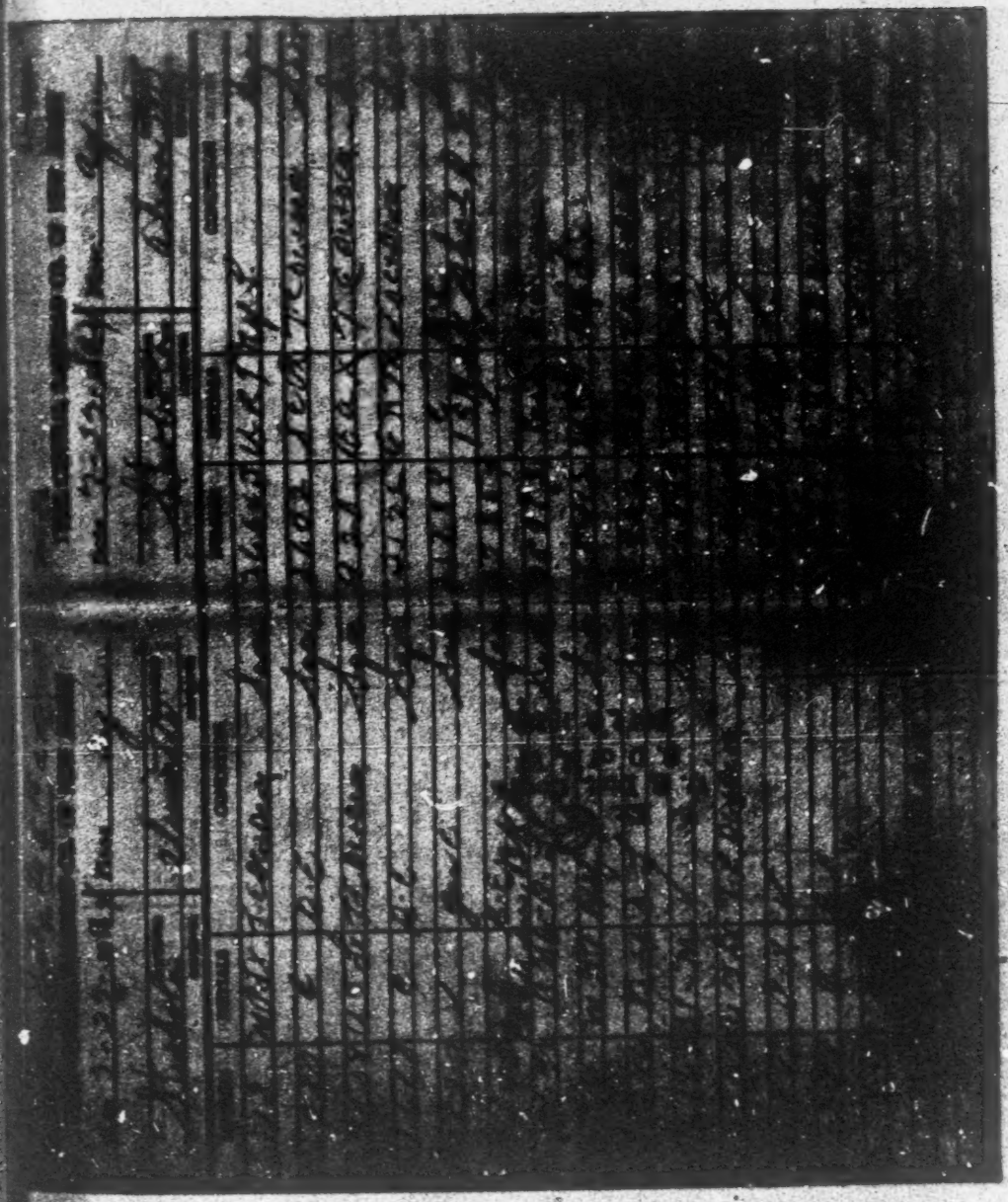
Photograph taken looking east



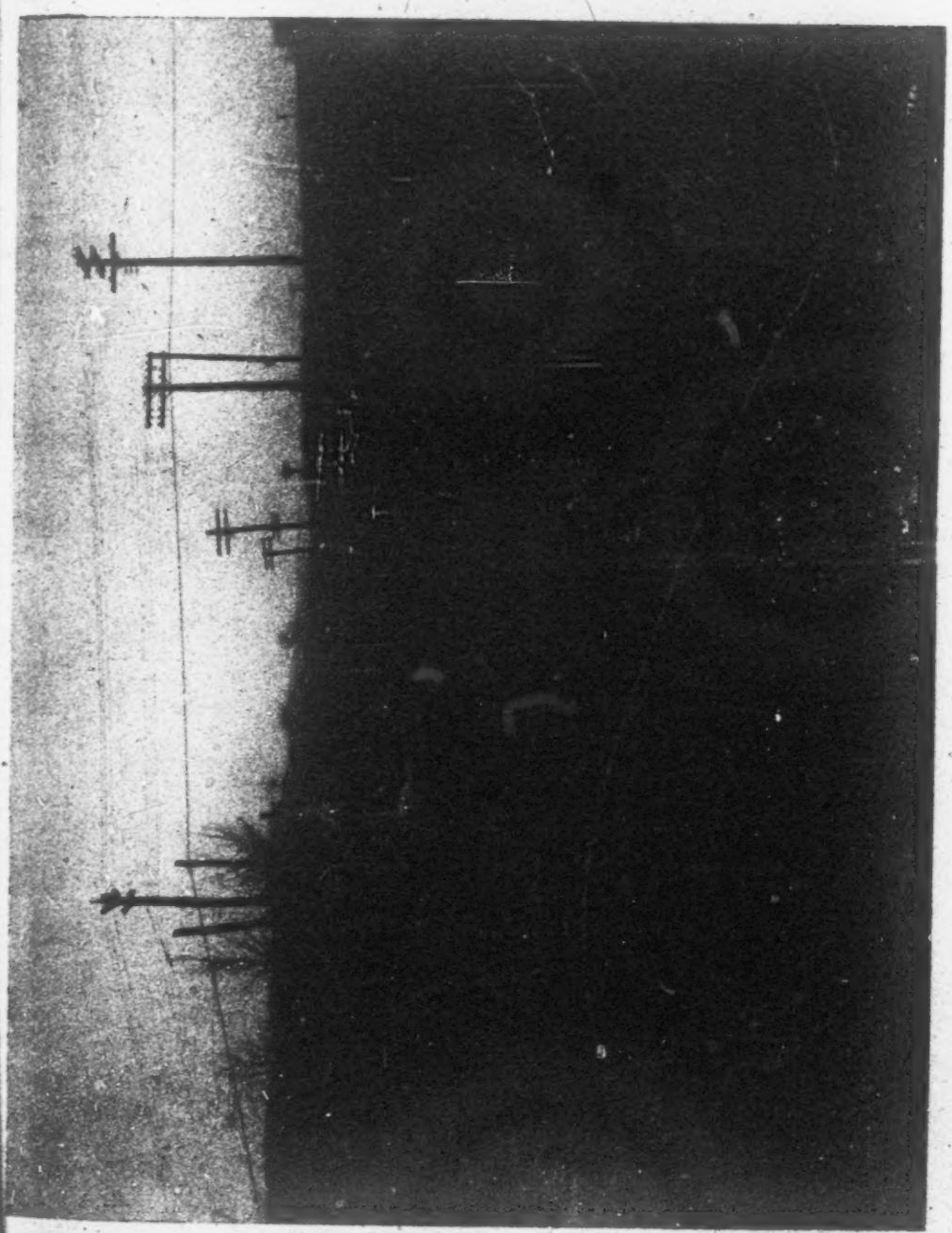
[fol. 466] DEFENDANT'S EXHIBIT G

Inspector's Records

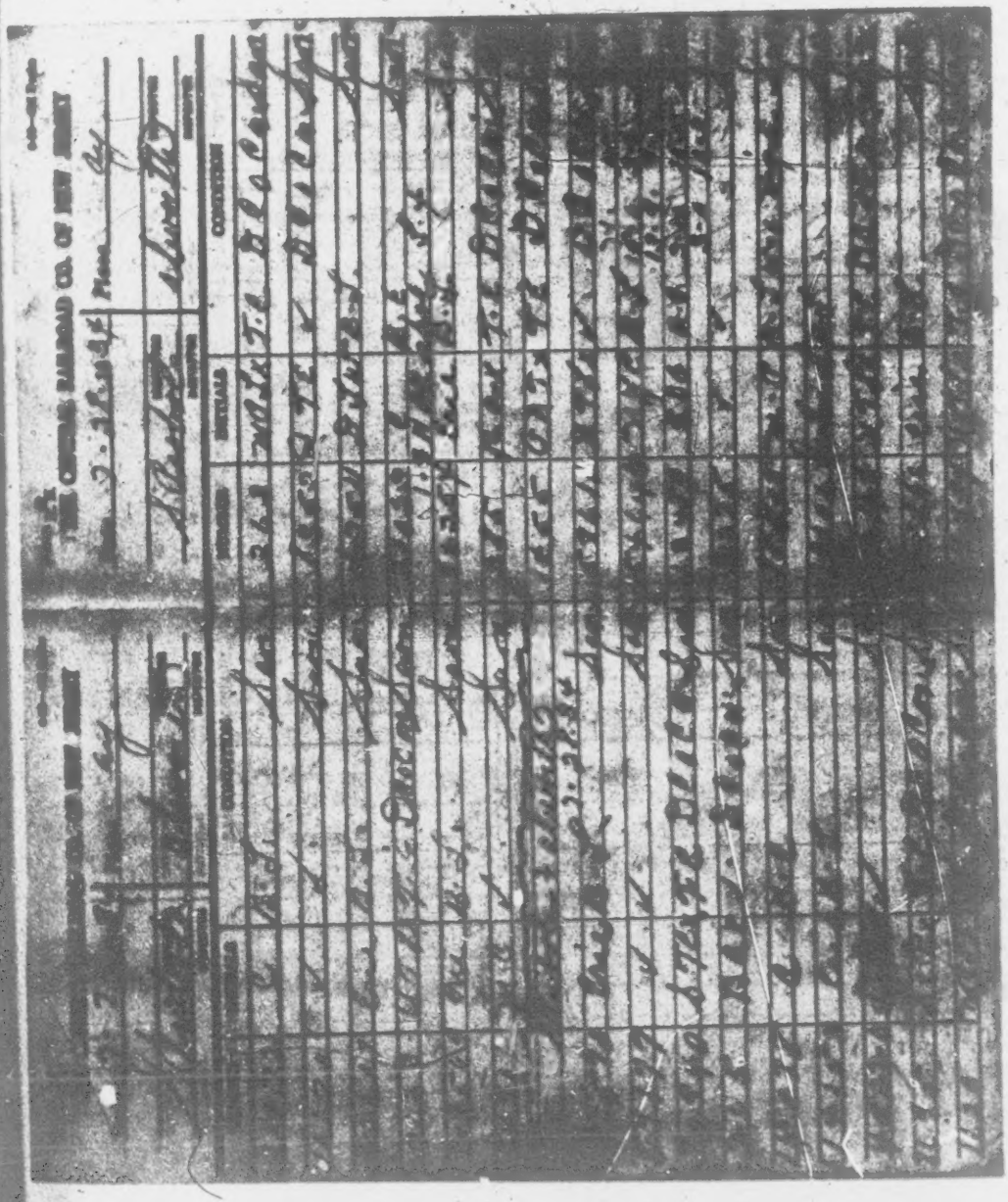
(2 pages covering Ashley Special 7/27/34)



[fols. 454-455] Defendant's Exhibit D—Continued



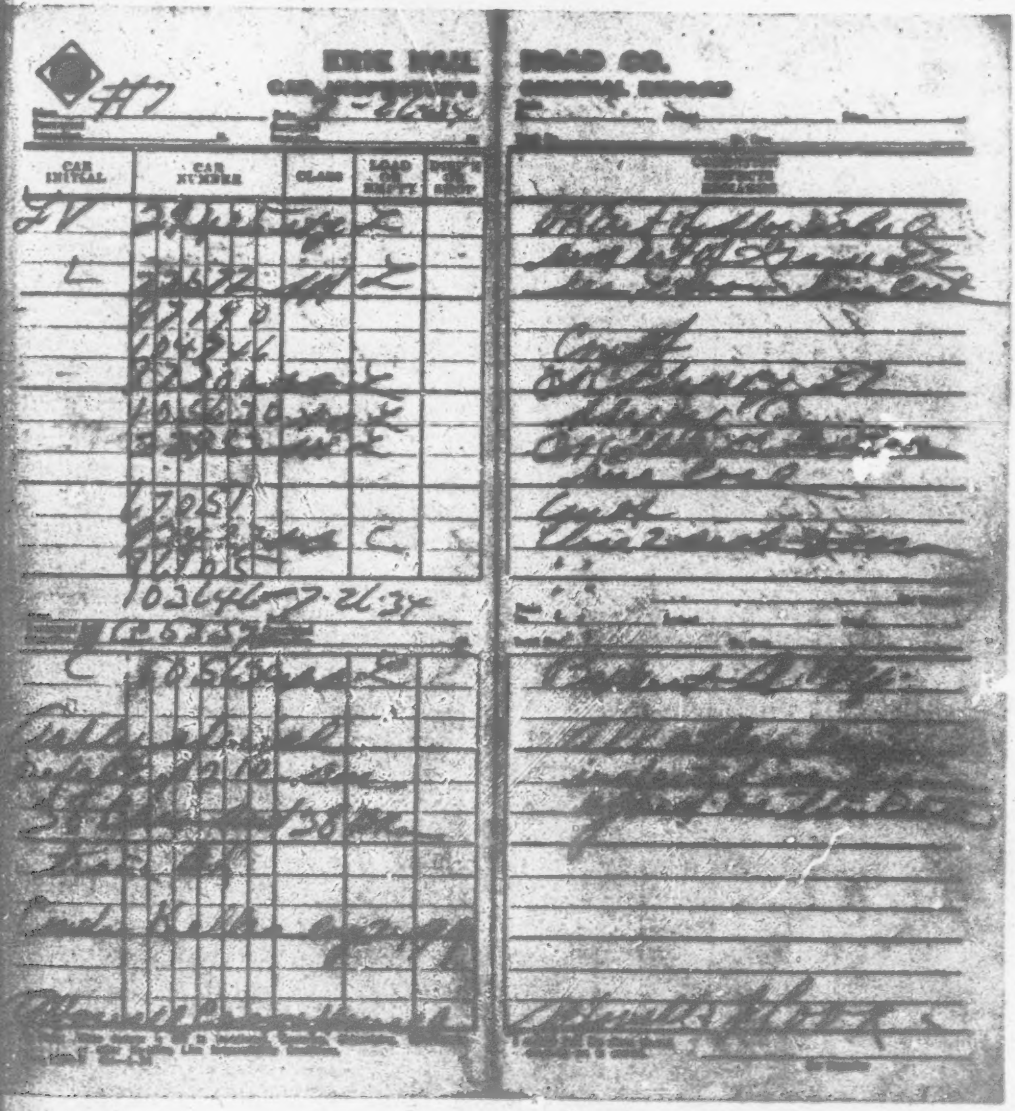
[fol. 467] Defendant's Exhibit 5—Continued



[fols. 468-469] DEFENDANT'S EXHIBIT H

Inspector's Records -

(Howell) (page covering Ashley Special)



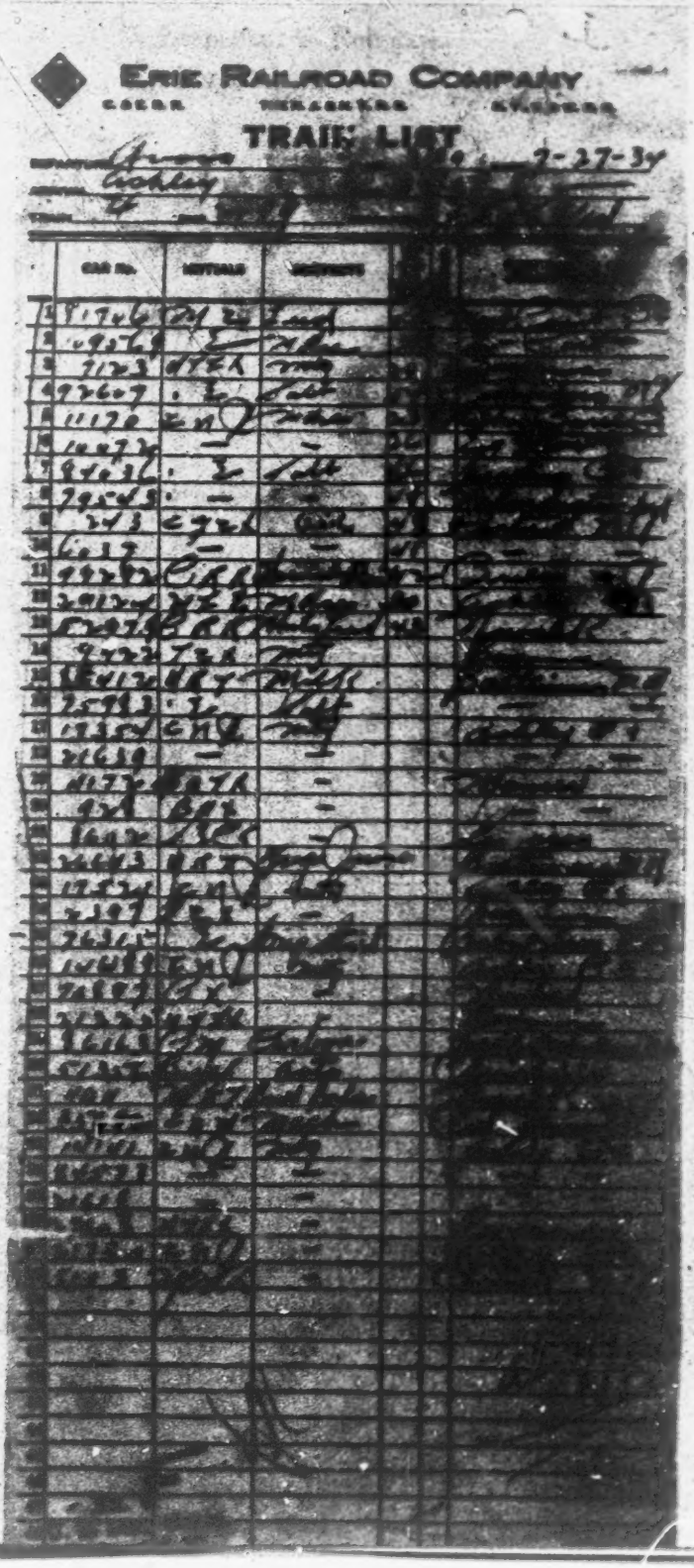
[fols. 464-465] DEFENDANT'S EXHIBIT F

Train List

ERIE RAILROAD COMPANY

TRAIN LIST

2-27-34



[fols. 470-471] DEFENDANT'S EXHIBIT I

Blueprint showing land surfaces

[fols. 472-473] DEFENDANT'S EXHIBIT J

Keller's Detention Report

ERIE RAILROAD COMPANY

Avoca, Pa. [illegible] 1937

Engine [illegible] Engineer [illegible] Condr [illegible]

Departed Avoca [illegible] a.m.

Arrived Plains Jct. [illegible] a.m.

Departed " " [illegible] a.m.

Arrived Ashley [illegible] a.m.

[illegible] Loads [illegible] Empties [illegible] Tons

Departed Ashley [illegible] a.m.

Arrived Plains Jct. [illegible] a.m.

Departed " " [illegible] a.m.

Arrived Avoca [illegible] a.m.

[illegible] Loads [illegible] Empties [illegible] Tons

Pusher [illegible]

Delays [illegible]

Departed Ashley [illegible] a.m.

Arrived KV [illegible] a.m.

Departed KV [illegible] a.m.

Arrived Plains Jct. [illegible] a.m.

[illegible] Loads [illegible] Empties [illegible] Tons

Ex. D. S. Dist. Court S. D. of N. Y. [illegible]

[fol. 474] IN UNITED STATES DISTRICT COURT

[Title omitted]

STIPULATION AS TO EXHIBITS

It is hereby stipulated by and between the attorneys for the parties hereto that for the purpose of the case on appeal in the above entitled action the printing of certain book records indicated as Plaintiff's Exhibit 7 and Defendant's Exhibits E, G and H, will be dispensed with except those certain pages contained in the book records which specifically refer to the train or cars involved in the case at bar; it is further stipulated that the original books or the parts thereof which have been introduced in evidence, may be referred to by either party in preparation of the briefs or upon argument of the appeal.

Dated, New York, N. Y., December 18, 1936.

Bernard G. Nemeroff, Attorney for Plaintiff. Davis, Polk, Wardwell, Gardiner & Reed, Attorneys for Defendant.

[fol. 475] IN UNITED STATES DISTRICT COURT

[Title omitted]

EXTRACT OF THE CLERK'S MINUTES—October 5, 1936

Now comes the Plaintiff By Bernard C. Nemeroff (Everett G. Hunt, Counsel), and moves the trial of this cause, likewise comes the Defendant by Davis, Polk, Wardwell, Gardiner & Reed (Theodore Kiendl, Counsel). Thereupon a Jury is duly impaneled and sworn, and the cause proceeds to trial. Opening statements made by Counsel.

On Oct. 6, 1936, at 10:30 A. M. trial continued. Plaintiff rests—Defendant's motion to dismiss, etc.: Denied—Exception.

[fol. 476] On Oct. 7, 1936, at 10:30 A. M. trial continued —Defendant rests—Both sides rest—Defendant renews motion to dismiss, etc.: Denied—Exception.

On Oct. 13th, 1936, at 10:30 A. M. trial continued.

Summations made by Counsel—Jury charged—Deputy Marshal sworn and Jury retired—at 4:15 P. M. the Jury

A. I told them right after it happened, as soon as I was—I didn't have no lawyers or anything then.

Q. Did you tell those gentlemen substantially as you have told us today under oath?

A. Yes, sir.

Q. Those men are living right out there, are they not?

A. Yes, sir.

Q. They are active practicing surgeons and in that hospital?

A. Yes, sir."

Ninth. The Court erred in not holding as a matter of law at the conclusion of the plaintiff's case that upon the plaintiff's own case he was guilty of contributory negligence barring recovery (Transcript of Record pp. 213-214).

Tenth. The Court erred in failing to hold at the conclusion of the plaintiff's case that the permissive pathway doctrine did not apply to longitudinal pathways such as herein involved, under the laws of the State of Pennsylvania and the decisions of this Court (Transcript of Record p. 214).

[fol. 488] Eleventh. The Court erred in admitting in evidence observations of witnesses with respect to condition of car doors on other occasions (Transcript of Record pp. 283, 284, 285 and particularly p. 285, as follows):

"Q. And as a matter of fact, you have done that many times, I mean as a man——

Mr. Kiendl: Oh, I object to that line of inquiry, if your Honor please. It is not what happened in other cases; we are interested in what happened here. It is not proper cross-examination.

Mr. Hunt: What I am leading up to is that——

The Court: Cross-examination. I will allow it."

Twelfth. The Court erred in admitting evidence as to the observations of witnesses with respect to condition of old cars in no wise involved in the case at bar (see Transcript of Record pp. 315-316, as follows):

"Q. All right. Now, one of your difficulties with your old cars is that after they have been running over the roads for thousands of miles and around the curves and all that,

one of your difficulties is, you know as a railroad man that—I am referring to a box car—your lower part of that door jumps that track on which it rides; that is one of the common complaints, is it not?

A. No, sir.

Mr. Kiendl: If your Honor please, I have no objection to this line of cross-examination if it is done with the understanding that Mr. Hunt is making the witness his own witness for this purpose. It involves matters concern-[fol. 489] ing which the witness was not examined on direct examination at all.

The Court: I don't say that they were, Mr. Kiendl, but I will overrule your objection.

Mr. Kiendl: May I have an exception, just to reserve that point, that contention?

The Court: Yes."

Thirteenth. The Court erred in admitting in evidence observations made by the witness on years previous as to condition of old cars in no wise involved in the case at bar (see Transcript of Record p. 378, as follows):

"Q. Now, how many years has it been, sir, since you saw —take one of your own wooden cars—since you have seen one of the doors off the flange of the rail, how many years has it been since you have seen that?

A. Why, my 19 years' experience on the road I haven't seen one, sir.

Q. You haven't seen one at all?

A. No, sir.

Q. You have never heard of a——

Mr. Kiendl: If your Honor please, for the purpose of the record I make the same objection and want the same exception as to this line of cross-examination that I made with the last witness, that it concerns matters on which this witness was not examined in chief, and for those purposes we must insist that the plaintiff is making the witness his own witness.

The Court: Overruled. Proper cross-examination.

Mr. Kiendl: Exception."

Fourteenth. The Court erred in admitting in evidence the observation of a witness as to condition of cars and car

[fol. 490] doors on previous years, the said cars being in no wise connected in the case at bar (Transcript of Record pp. 397-398, as follows):

"Q. Just a question or two. How many years has it been since you have seen, taking the—referring to a box car first, how many years since you have seen the door of a box car sprung off the run or rail that it runs on?

Mr. Kiendl: To be consistent, may I have the same objection and exception to this line of questioning?

The Court: Same ruling.

Mr. Kiendl: So it won't be assumed to have been waived in any sense."

Fifteenth. The Court erred (Transcript of Record, p. 415), in refusing the defendant's first request to charge in the form requested (see Transcript of Record, p. 405, as follows):

"1. The plaintiff has not pleaded or proven that the defendant was guilty of any wilful or wanton negligence and consequently you are not permitted to give any verdict on any such ground. Refused. Exception."

Sixteenth. The Court erred (Transcript of Record, p. 415), in refusing the defendant's sixth request to charge in the form requested (see Transcript of Record, p. 405, as follows):

"6. If you find that the plaintiff knew or should have known that it was dangerous to walk alongside this moving train in the darkness at the time and in the place here involved, he was negligent and cannot recover. Refused Covered. Exception."

[fol. 491] Seventeenth. The Court erred (Transcript of Record, p. 416), in refusing the defendant's ninth request to charge in the form requested (see Transcript of Record, p. 406, as follows):

"9. If you find that the so-called footpath ran substantially along the edge of the ties and was about two feet wide, I charge you as a matter of law that the overhang of the engine and the widest freight cars on this train were such that no one could walk out on that path alongside of this moving train with safety. Refused. Exception."

Eighteenth. The Court erred (Transcript of Record, p. 416), in refusing the defendant's tenth request to charge in the form requested (see Transcript of Record, p. 406, as follows):

"10. If you find that the so-called footpath ran substantially along the edge of the ties and was about two feet wide, I charge you as a matter of law that the plaintiff was in a dangerous position when the engine and cars passed him and if he knew or should have known that situation he was duty-bound to get out of the way. Refused. Exception."

Wherefore defendant prays that the said judgment of the United States Court for the Southern District of New York in the said cause be reversed, and judgment be rendered in favor of the defendant, with costs.

Davis Polk Wardwell Gardiner & Reed, Attorneys for Defendant, Office & Post Office Address, 15 Broad Street, Borough of Manhattan, City of New York.

[fols. 492-493] Citation, in usual form, omitted in printing.

[fol. 494] In United States District Court

[Title omitted]

Stipulation as to Record

It is hereby stipulated and agreed that the foregoing is a true transcript of the record of the said District Court in the above cause as agreed upon by the parties.

Dated, New York, January 14, 1937.

Bernard G. Nemeroff, Attorney for Plaintiff. Davis Polk Wardwell Gardiner & Reed, Attorneys for Defendant.

[fol. 495] Clerk's certificate to foregoing transcript omitted in printing.

returned a verdict for the Plaintiff for $30,000—Defendant's motion to set verdict aside etc: Decision reserved—Briefs to be submitted within 10 days.

On November 9, 1936, the Court rendered its decision denying the motion to set aside the verdict.

Charles Weiser, Clerk.

[fol. 477] In United States District Court for the Southern District of New York

L58—389

Harry J. Tompkins, Complainant,

against

Erie Railroad Co. (a New York Corporation), Defendant

Defendant's address: 50 Church Street, New York City.
Plaintiff's address: 1125 Wyoming Avenue, Exeter, Pa.

Judgment

The issues in the above entitled action having been brought on regularly for trial before the Hon. Samuel Mandelbaum and a Jury at a Jury Part of this Court held in the Federal Court House in the City, County and State of New York, on the 5th, 6th, 7th and 13th days of October, 1936, respectively, and both parties having appeared by counsel, and the issues having been duly tried, and the Jury having duly rendered a verdict in favor of the plaintiff and against the defendant in the sum of $30,000.00 on the 13th day of October, 1936, and at the close of said trial and the rendition of said verdict by the Jury counsel for the defendant having made a motion to set aside the said verdict as being against the weight of the evidence and the law, and, after due deliberation, Hon. Samuel Mandelbaum having denied said motion, and interest on the sum of $30,000.00 from October 13, 1936 to the date of the entry of the within judgment, amounting to the sum of $165.00 having accrued, and the costs of said plaintiff having been duly taxed at $95.00

[fol. 478] Now, on motion of Bernard G. Nemeroff, attorney for the plaintiff, it is

Adjudged that the plaintiff Harry J. Tompkins recover of the defendant Erie Railroad Co., a New York Corporation the sum of $30,000.00, found by the Jury, together with the sum of $165.00 interest on said sum from October 13, 1936 to the date hereof and together with the sum of $95.00 costs as taxed, making in all the sum of $30,260.00 and that the plaintiff have execution therefor.

Judgment signed and entered this 16th day of November, 1936.

Charles Weiser, Clerk.

[fol. 479] In United States District Court

[Title omitted]

Affidavit of No Opinion

State of New York,
County of New York,
Southern District of New York, ss:

L. Ray Glass being duly sworn deposes and says that he is an attorney and counsellor at law associated with the firm of Davis, Polk, Wardwell, Gardiner & Reed, attorneys for the defendant herein.

That he is familiar with the above entitled action and assisted in the trial of the same on October 5, 6, 7 and 13, 1936, before Hon. Samuel Mandelbaum and jury, at a Stated Term of the United States District Court for the Southern District of New York.

That upon information and belief no opinion was handed down by Hon. Samuel Mandelbaum in this case.

L. Ray Glass.

Sworn to before me this 17th day of December, 1936. Wm. H. Bruder, Notary Public, Bronx County No. 122. Certificate filed in New York County No. 611. Bronx County Register's No. 126B37. New York County Register's No. 7B347. Commission expires March 30, 1937. (Seal.)

[fol. 480] IN UNITED STATES DISTRICT COURT

[Title omitted]

PETITION FOR APPEAL

To the Honorable The Judges of the United States District Court for the Southern District of New York:

Now comes the Erie Railroad Company, defendant above named, and says that on or about the 16th day of November, 1936, this Court entered a judgment herein in favor of the plaintiff and against the defendant which judgment ordered and adjudged that the plaintiff recover from the defendant the sum of $30,000, besides the costs of this action taxed at $95.00, and interest from the date of the rendition of the verdict to the entry of the judgment in the sum of $165.00, and have execution therefor; and that in said judgment and the proceedings had prior thereto in this cause certain errors were committed to the prejudice of this defendant, all of which will more in detail appear in the assignment of errors which is filed with this petition.

[fol. 481] Wherefore this defendant prays that an order may issue in its behalf allowing defendant to appeal to the United States Circuit Court of Appeals for the Second Circuit for correction of errors so complained of, and that a transcript of the record, proceedings and papers in this cause duly authenticated may be sent to the aforesaid Circuit Court of Appeals.

Your petitioner submits herein good and sufficient bond for the aforesaid appeal and further prays for an order approving the said bond.

Dated, New York, N. Y., December 15th, 1936.

Davis, Polk, Wardwell, Gardiner & Reed, Attorneys for Defendant, Office & Post Office Address, 15 Board Street, Borough of Manhattan, City of New York.

[fol. 482] IN UNITED STATES DISTRICT COURT

[Title omitted]

ORDER ALLOWING APPEAL—December 15, 1936

Defendant above named having prayed for the allowance of an appeal to the United States Circuit Court of Appeals

for the Second Circuit from the judgment made and entered in the above entitled cause by the United States District Court for the Southern District of New York on the 16th day of November, 1936, and from each and every part thereof, and having presented and filed its petition for appeal, assignment of errors, and prayer for reversal, pursuant to the statutes and the rules of said Circuit Court of Appeals for the Second Circuit in such case made and provided; it is [fol. 483] Now hereby ordered and the same hereby is allowed to this cause to the United States Circuit Court of Appeals for the Second Circuit from said District Court to the manner and to the extent prayed and as provided by law; and it is

Further ordered that the Clerk of said District Court shall prepare and certify a transcript of the record, proceedings and judgment in this cause, and transmit the same under the seal of this Court to the United States Circuit Court of Appeals for the Second Circuit, so that he shall have the same in the said Court within thirty days of this date; and it is

Further ordered that the bond for the aforesaid appeal submitted herein by the defendant be and the same hereby is approved.

Jno C. Knox, U. S. D. J.

[fol. 484] In United States District Court

[Title omitted]

Assignment of Errors

Now comes Erie Railroad Company, defendant above named, and in connection with its petition for allowance of an appeal herein, files the following assignment of errors upon which the defendant will rely in prosecution of the said appeal from a judgment of this Court entered on the 16th day of November, 1936:

First. The Court erred in submitting the issues to the jury as questions of fact.

Second. The Court erred in denying defendant's motion to dismiss the complaint made at the end of the plaintiff's case (Transcript of Record pp. 213-214).

Third. The Court erred in denying the defendant's motion to dismiss the complaint at the conclusion of the entire case (Transcript of Record p. 401).

Fourth. The Court erred in denying the defendant's motion to set aside the verdict and for a new trial made after [fol. 485] the rendition of the verdict by the jury (Transcript of Record p. 418).

Fifth. The Court erred in admitting evidence over the objection of the defendant with respect to a pathway which crossed the tracks and which was in no wise involved in the accident out of which this action arises (see Transcript of Record pp. 41-42, as follows):

"The Court: Suppose you reframe the question.

Q. What kind of a path was this after it crossed the railroad track, where did it lead to and what kind of a path was it?

Mr. Kiendl: I object to that as wholly immaterial. The path across the railroad track has nothing to do with the issues in this case.

The Court: Overruled.

Mr. Kiendl: May I have an exception?"

Sixth. The Court erred in allowing plaintiff's counsel to ask a question in improper form and calling for a conclusion (See Transcript of Record p. 89, as follows):

"Q. So to get at the truth of this matter, you don't know of any occasion why you should ever be reading the complaint and you have no recollection of it?

Mr. Kiendl: I object to the form of that question, if your Honor please—'so as to get to the truth of this matter.'

The Court: Overruled.

Mr. Kiendl: Exception."

Seventh. The Court committed error in admitting evi- [fol. 486] dence with respect to conversations had by the plaintiff with attending physicians (see Transcript of Record pp. 89-90, as follows):

"Q. By the way, before you ever knew Mr. Nemeroff had you told the doctors there in the hospital, later on, how your accident happened?

A. Yes, sir.

Q. Had you told them the same as you told his Honor and these gentlemen?

Mr. Kiendl: I object to that, to what he told the doctors in the hospital being the same as he has testified to here.

The Court: Overruled.

Mr. Kiendl: Exception.

Q. Had you, Mr. Tompkins?

A. Yes, sir.

Q. As a matter of fact, if anyone asked you about your accident you told them substantially the same as you have told us here?

A. Yes, sir.

Mr. Kiendl: I object to that as improper redirect, as calling for a conclusion, and as irrelevant, incompetent and immaterial.

The Court: Overruled.

Mr. Kiendl: Exception."

Eighth. The Court erred in allowing plaintiff to testify over the objection of the defendant, with respect to conversations alleged to have been had by plaintiff with attending physicians (see Transcript of Record pp. 101-102, as follows):

"By Mr. Hunt:

Q. Just one question: These gentlemen you spoke of, the surgeons who took care of you, you had told them about [fol. 487] your accident before you ever had a lawyer or ever started any case at all, hadn't you?

A. Yes, sir.

Mr. Kiendl: I make the same objection to protect the situation that I did before.

The Court: Both of you gentlemen opened the door pretty wide and I think it is pertinent. It is all right.

Q. Did you tell them before or after you ever had a lawyer?

Mr. Kiendl: May I have the same objection and an exception to this line, without constantly objecting?

The Court: The same ruling.

[fol. 503] SUPREME COURT OF THE UNITED STATES

ORDER ALLOWING CERTIORARI—Filed October 11, 1937

The petition herein for a writ of certiorari to the United States Circuit Court of Appeals for the Second Circuit is granted.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

Mr. Justice Black took no part in the consideration and decision of this application.

Endorsed on cover: Enter: Harold W. Bissell. File No. 41,848. U. S. Circuit Court of Appeals, Second Circuit. Term No. 367. Erie Railroad Company, petitioner, vs. Harry J. Tompkins. Petition for writ of certiorari and exhibit thereto. Filed August 30, 1937. Term No. 367, O. T., 1937.

[fol. 496] UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT, OCTOBER TERM, 1936

Argued March 12, 1937. Decided June 7, 1937

No. 307

HARRY J. TOMPKINS, Plaintiff-Appellee,

v.

ERIE RAILROAD CO. (a New York Corporation), Defendant-Appellant

Appeal from the District Court of the United States for the Southern District of New York

Before Manton, L. Hand, and Swan, Circuit Judges

From a judgment for the plaintiff in a personal injury action tried to a jury, the defendant appeals. Affirmed.

Davis, Polk, Wardwell, Gardiner & Reed, of New York City (Theodore Kiendl, Harold W. Bissell, and L. Ray Glass, all of New York City, of counsel), for appellant.

Bernard G. Nemaroff, of New York City (G. Everett Hunt and William G. Walsh, both of New York City, of counsel), for appellee.

SWAN, Circuit Judge:

This action was brought to recover damages for personal injuries sustained by the plaintiff when hit by a moving freight train as he was walking along the defendant's right of way. At the conclusion of the evidence the defendant moved to dismiss for failure of proof of actionable negligence on the part of the defendant and for affirmative proof of contributory negligence on the part of the plaintiff. A denial of this motion is the error chiefly relied upon for reversal of the plaintiff's judgment.

The accident happened about 2:30 a. m. on July 27, 1934, as the plaintiff was procedeing to his home on Hughes street, in Hughestown, Pa. Hughes street is a stub-end street ending at the westerly side of the railroad right of way. The next street to the south is Rock street which crosses the single line track at grade. The plaintiff alighted

from a friend's automobile at the Rock street crossing and walked along a beaten pathway that runs in a northerly direction adjacent and parallel to the railroad track for about 115 feet, where it intersects a diagonal path leading out of Hughes street and across the track. The defendant's freight train approached from the direction in which the plaintiff was walking. He heard it whistle for the Rock street crossing, saw its headlight as it rounded the curve ahead, and continued to walk toward it. He says it was traveling 30 or 35 miles an hour. The train crew testified to a speed of 8 or 10 miles an hour. The pathway upon which the plaintiff walked is approximately 2 feet wide and runs along about 2 feet from the ends of the ties, although in some places it is less. The locomotive extended more than a foot beyond the ends of the ties and the widest car overhung them one foot and five inches. Tompkins himself testified that the distance between his body and the moving train was between one and two feet. The night was dark and there was no artificial light. When he had almost reached the intersection of the two paths the engine passed him, and just as he got to the intersection "a black object that looked like a door" loomed up in front. Before he could even raise his hands, he was struck on the head and thrown to the ground in such a way that his right arm came under the wheels of the train. He believes the black object to have been a swinging door on a refrigerator car and [fol. 497] says it projected from the side of the train two or two and a half feet. There was no witness to the accident other than the plaintiff, but much testimony was introduced with respect to the exact location of the paths, the long period of years during which the residents of Hughestown had been accustomed to use them, and the character of the ground lying between the longitudinal path and the fence marking the west boundary of the railroad right of way.

The defendant contends, citing Falchetti v. Pennsylvania R. Co., 307 Pa. 203, 160 A. 859; Koontz v. Baltimore & O. R. Co., 309 Pa. 122, 163 A. 212, that the only duty owed to the plaintiff was to refrain from willful or wanton injury because the courts of Pennsylvania have so ruled with respect to persons using a customary longitudinal path, as distinguished from a path crossing the track. The plaintiff denies that such is the local law, but we need not go into this matter since the defendant concedes that the great weight

of authority in other states is to the contrary. This concession is fatal to its contention, for upon questions of general law the federal courts are free, in absence of a local statute, to exercise their independent judgment as to what the law is; and it is well settled that the question of the responsibility of a railroad for injuries caused by its servants is one of general law. Baltimore & O. Railroad Co. v. Baugh, 149 U. S. 368, 13 S. Ct. 914, 37 L. Ed. 772; Cole v. Pennsylvania R. Co., 43 F. (2d) 953, 71 A. L. R. 1096 (C. C. A. 2), and cases cited therein; Redfield v. New York Cent. R. Co., 83 F. (2d) 62, 65 (C. C. A. 8). Where the public has made open and notorious use of a railroad right of way for a long period of time and without objection, the company owes to persons on such permissive pathway a duty of care in the operation of its trains. Southern Ry. Co. v. Cochran, 29 F. (2d) 206 (C. C. A. 5); New York, N. H. & H. R. Co. v. Kmetz, 193 F. 603 (C. C. A. 2); Erie R. Co. v. Burke, 214 F. 247 (C. C. A. 2); Robbins v. Pennsylvania Co., 245 F. 435, 441 (C. C. A. 6); Pennsylvania R. Co. v. Lackner, 246 F. 931 (C. C. A. 3); American Law Institute, Torts, § 334. It is likewise generally recognized law that a jury may find that negligence exists toward a pedestrian using a permissive path on the railroad right of way if he is hit by some object projecting from the side of the train. Southern Ry. Co. v. Cochran, 29 F. (2d) 206 (C. C. A. 5); Schultz v. Erie R Co., 46 F. (2d) 285 (C. C. A. 3); St. Louis, S. W. Ry. Co. v. Wilcox, 57 Tex. Civ. App. 3, 121 S. W. 588; Missouri, K. & T Ry. Co. v. Scarborough, 29 Tex. Civ. App. 194, 68 S. W. 196; St. Louis, S. W. Ry. Co. v. Balthrop (Tex. Civ. App.) 167 S. W. 246; Chesapeake & O. Ry. Co. v. Davis, 58 S. W. 698, 22 Ky. Law Rep. 748; Pruitt v. Southern Ry. Co., 167 N. C. 246, 83 S. E. 350; Scott v. Davis, 216 Mo. App. 530, 270 S. W. 433; cf. Louisville & N. R. Co. v. Marlow, 169 Ky. 140, 183 S. W. 470. Plaintiff's testimony that the black object which struck him looked like a swinging door was sufficient to take to the jury the question whether he was injured in the manner alleged and whether the defendant was negligent in allowing a door to swing, despite the defendant's testimony that an inspection at Ashley showed all car doors to be closed and sealed.

The main contention of the appellant is that the plaintiff's conduct in walking so close to a moving train in the dark constituted contributory negligence as a matter of law. Much testimony was directed to the character of the ground

lying between the longitudinal path and the fence, the plaintiff endeavoring to prove that he could not safely have walked outside the beaten path, and the defendant that he could. Witnesses testified that no one ever walked outside the path because the ground slanted away toward the fence and there were ruts in it; but the fact that trucks and automobiles of all sorts were accustomed to pass along the right of way from Rock street to Hughes street proves conclusively that the ground was traversable outside the beaten path, and the photographs show that at the worst it is only a little rough at the spot where Tompkins was struck. The contention that he could not have stepped aside while the train was passing is patently absurd. So the question is reduced to whether he was guilty of contributory negligence as a matter of law in not avoiding all danger by the simple expedient of stepping to one side. On this issue we must take the evidence in the light most favorable to the plaintiff and must assume that the train was moving at a speed of only 8 to 10 miles an hour, as the train crew testified.

As always in judging of negligence, it is a question of the [fol. 498] gravity of the danger, coupled with its likelihood, as compared with the opportunity of avoiding it. The B. B. No. 21, 54 F. (2d) 532, 533 (C. C. A. 2). In the case at bar, the opportunity to avoid danger was easily available and the danger was very great, if anything should happen to be projecting from the train; but we cannot say that this particular danger was likely, in view of the testimony of the train checkers that seldom, if ever, had they known a door to swing open. Nor can we say, in view of the cases, that the possibility of being hit by some unusual object projecting from the side of a train is one that ought to be foreseen and enough to charge the plaintiff with contributory negligence as a matter of law, if he remains within reach of it. Schultz v. Erie R. Co., 46 F. (2d) 285 (C. C. A. 3); Pruitt v. Southern Ry. Co., 167 N. C. 246, 83 S. E. 350; Missouri, K. & T. Ry. Co. v. Scarborough, 29 Tex. Civ. App. 194, 68 S. W. 196; St. Louis, S. W. Ry. Co. v. Wilcox, 57 Tex. Civ. App. 3, 121 S. W. 588; Texas & P. Ry. Co. v. Green, 291 S. W. 929, affirmed (Tex. Com. App.) 299 S. W. 639; Chesapeake & O. Ry. Co. v. Davis, 58 S. W. 698, 22 Ky. Law Rep. 748; Sullivan v. Vicksburg, S. & P. R. Co., 39 La. Ann. 800, 2 So. 586, 4 Am. St. Rep. 239. To us it would seem imprudent to walk, or even to stand, in the dark within a foot of a train moving at the rate of 10 miles an hour; but the fact that

recoveries have been allowed under closely similar circumstances in the cases above cited indicates that fair-minded men may hold a different view. This is enough to preclude taking the issue from the jury. Richmond & Danville Railroad Co. v. Powers, 149 U. S. 43, 45, 13 S. Ct. 748, 37 L. Ed. 642; Texas & Pac. Ry. Co. v. Harvey, 228 U. S. 319, 33 S. Ct. 518, 57 L. Ed. 852. Even when a plaintiff has stood so close to the edge of a station platform as to be thrown down by the suction of a swiftly passing train, the question of contributory negligence has been left to the jury. Munroe v. Pennsylvania R. Co., 85 N. J. Law, 688, 90 A. 254, Ann. Cas. 1916A, 140. In Delaware & H. R. Co. v. Wilkins, 153 F. 845 (C. C. A. 2), this court held that it was contributory negligence for the plaintiff not to step aside beyond the reach of the bucking beam of an engine rounding a curve. This would be apposite if the present plaintiff had been struck by the end of a car, for he must anticipate that some of the cars may overhang the ends of the ties. He is not, however, obliged to anticipate unusual projections from the side of the cars, and from the jury's verdict we must take it that he was injured by a projecting door. We do not think it was error to leave the issue of contributory negligence to the jury.

The appellant contends that error was committed in permitting the plaintiff to testify on redirect examination as to statements he had made to doctors and others concerning the way the accident happened. It is necessary to explain how this came about. On direct examination the plaintiff had testified that he was struck by "a black object that looked like a door to me." On cross-examination he testified that from the time of the accident it had always been his impression that the black object was a door swinging out from a car; that this had always been his claim, and he had told this to his attorneys. He was then confronted with a verified bill of discovery, prepared by his attorneys and attested by him, which alleged that he was unable to state what was the object which the defendant permitted to project from the train, and contained other allegations at variance with his testimony. Such allegations he admitted to be false, as well as similar allegations in the complaint in the present action, verified by his attorney, with respect to the speed of the train and its failure to give warning of its approach. Thus he stood impeached in important respects. On redirect examination he was allowed to testify that be-

fore he ever knew Mr. Nemeroff, his attorney, he had told the doctors at the hospital; and any one else who asked him about the accident, that it happened as he had explained to the court and jury; that he had never been willing to swear positively that it was a door which struck him, but he believed it to be. On recross-examination he gave the names of the doctors he had told of the accident and was interrogated as to what he said to them. The appellant contends that the statements elicited on redirect examination concerning conversations were improper rehabilitating testimony to meet the impeaching admissions brought out on cross-examination. See Dowdy v. United States, 46 F. (2d) 417, 424 (C. C. A. 4); Di Carlo v. United States, 6 F. (2d) [fol. 499] 364, 366 (C. C. A. 2); Ferris v. Sterling, 214 N. Y. 249, 254, 108 N. E. 406, Ann. Cas. 1916D, 1161. But it seems to us that the cross-examination had been so broad as to render the redirect competent. He was asked on cross-examination whether he had always had the impression that he was hit by a car door and whether that had always been his claim. To explain his answer that it had, it was proper to allow him to say that he had told the doctors so immediately after the accident.

Judgment affirmed.

[fol. 500] UNITED STATES CIRCUIT COURT OF APPEALS, SECOND CIRCUIT

At a stated term of the United States Circuit Court of Appeals, in and for the Second Circuit, held at the United States Court House in the City of New York, on the 14th day of June, one thousand nine hundred and thirty-seven.

Present: Hon. Martin T. Manton, Hon. Learned Hand, Hon. Thomas W. Swan, Circuit Judges.

HARRY J. TOMPKINS, Plaintiff-Appellee,

vs.

ERIE RAILROAD COMPANY, Defendant-Appellant

Appeal from the District Court of the United States for the Southern District of New York

This cause came on to be heard on the transcript of record from the District Court of the United States for the Southern District of New York, and was argued by counsel.

On Consideration Whereof, it is now hereby ordered, adjudged, and decreed that the judgment of said District Court be and it hereby is affirmed with interest and costs.

It is further ordered that a mandate issue to the said District Court in accordance with this decree.

Wm. Parkin, Clerk.

[fol. 501] [Endorsed:] United States Circuit Court of Appeals, Second Circuit. Harry J. Tompkins vs. Erie Railroad Company. Order for mandate. United States Circuit Court of Appeals, Second Circuit. Filed June 14, 1937. William Parkin, Clerk.

[fol. 502] UNITED STATES OF AMERICA,
Southern District of New York:

I, William Parkin, Clerk of the United States Circuit Court of Appeals for the Second Circuit, do hereby certify that the foregoing pages, numbered from 1 to 501, inclusive, contain a true and complete transcript of the record and proceedings had in said Court, in the case of Harry J. Tompkins, Plaintiff-Appellee, against Erie Railroad Company, Defendant-Appellant, as the same remain of record and on file in my office.

In Testimony Whereof, I have caused the seal of the said Court to be hereunto affixed, at the City of New York, in the Southern District of New York, in the Second Circuit, this 6th day of August, in the year of our Lord one thousand nine hundred and thirty-seven, and of the Independence of the said United States the one hundred and sixty-second.

Wm. Parkin, Clerk, by D. E. Roberts, Deputy Clerk.
(Seal United States Circuit Court of Appeals, Second Circuit.)

Table of Statutes Cited.

PAGE

Judicial Code as amended by the Act of February 13, 1925, Ch. 229, sec. 1; 43 Stat. 938; 28 U. S. C. A. sec. 347 (a) 13

Act of September 24, 1789, c. 20, sec. 34, 1 Stat. 92, as revised; Rev. Stat. sec. 721; 28 U. S. C. A., sec. 725 .....10, 13, 20

Purdon's Penn. Statutes, Title 67, secs. 491-2 30

Table of Other Authorities Cited.

Restatement, Conflict of Laws, sec. 380 15

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1937.

No. .....

ERIE RAILROAD COMPANY (a New York Corporation),
Petitioner,

v.

HARRY J. TOMPKINS.

PETITION FOR A WRIT OF CERTIORARI TO THE CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

TO THE HONORABLE, THE CHIEF JUSTICE AND THE ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

The Erie Railroad Company petitions for a writ of certiorari to review a decision of the Circuit Court of Appeals for the Second Circuit rendered June 14, 1937 in Harry J. Tompkins, plaintiff-appellee, against Erie Railroad Company (a New York corporation), defendant-appellant (pp. 501-2).

The suit was instituted in the United States District Court for the Southern District of New York to recover $100,000 damages for personal injuries sustained by the plaintiff while walking on defendant's right of way at Hughestown, Pennsylvania, on July 27, 1934 (fols. 7-24). The jury brought in a verdict for $30,000 damages (fols. 1252-3), upon which the District Court rendered a judgment for the plaintiff, dated November 16, 1936 in the sum of $30,260 (fols. 1429-1433).

Upon appeal by this petitioner (fols. 1438-1477), the Circuit Court of Appeals, by the decision above mentioned, affirmed the judgment of the District Court. The opinion of affirmance may be found at pages 496-501 of the record, and is reported in 90 Fed. (2nd) at page 603.

Statement of the Case.

According to the plaintiff's testimony he was struck by a projection from the defendant's train while he was walking at night on a wholly unilluminated pathway alongside defendant's track in Hughestown, Pennsylvania, and was thrown under the wheels, sustaining injuries resulting in the amputation of his right arm.

It is believed that the courts below committed two errors of such a nature as to merit a review by this Court. First, the courts below refused to follow the Pennsylvania law which repudiates the doctrine of permissive pathways along a railroad's right of way (as distinguished from permissive crossings) and accordingly imposes no obligation upon the railroad in such cases except the obligation to refrain from wilful or wanton injury. Second, the courts below refused to hold the plaintiff guilty of contributory negligence as a matter of law and, in that connection, applied a prejudicially erroneous test to determine whether the question was for the jury.

The accident occurred on the defendant's right of way at a point some distance northeast of the Rock Street crossing, a public grade crossing in Hughestown, Pennsylvania. Looking northeasterly from the Rock Street crossing, the longitudinal pathway on which the plaintiff was walking extends along the left side of the track, just outside the ties, to an intersection with a diagonal pathway which leads westerly into Hughes Street (a stub end street running westerly from the left or westerly boundary line of defendant's right of way). The diagonal pathway also extends to the right or easterly across the track. The distance from the Rock Street

grade crossing to the diagonal cross-path is about 115 feet.[1]

On the night of the accident, after visiting his sick mother-in-law until about 12:30 A. M., the plaintiff, according to his testimony, arrived at the Rock Street grade crossing in an automobile with two other men at about 2:30 A. M. At this point he left the automobile, intending to walk along the longitudinal pathway to its intersection with the diagonal pathway and then turn left (away from the track) on the diagonal pathway in order to reach Hughes Street, on which he lived (fols. 100-1, 132-5, 138-140, 178, 230-5).

After starting out on the longitudinal pathway, plaintiff testified, he heard a train whistle ahead of him, heard the noise of the train and saw the headlight on the engine as it approached him, but deliberately continued walking on the pathway until he was struck (fols. 194-201, 249, 140-1, 190-1), thus contradicting his complaint which alleged there was no signal and that he was unaware of the approach of the train (fols. 14-15).

Except for the momentary light from the headlight, which vanished after the engine passed him, the plaintiff conceded that the pathway was totally unilluminated and that it was a very dark night (fols. 178-9, 543-4; and see plaintiff's bill of discovery, fols. 40, 42, 48).

This longitudinal pathway on which the plaintiff was walking was about two feet wide (fols. 108, 180, 597-9). While plaintiff's witnesses differed somewhat in describing the proximity of the walk to the end of the ties,[2] the variation in esti-

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[1] See fols. 100-131, 348-9, 154, 238-9. The area is photographed looking northeasterly (Pl. Ex. 2, p. 423; Pl. Ex. 6, p. 431; Def. Exs. A, B, and D taken from a little distance, pp. 435, 437, 450-461; Def. Ex. C taken closer, pp. 439, 441) and looking southwesterly (Pl. Ex. 3, p. 425; Pl. Ex. 5, p. 429). The pathway is on the same side of the track as the striped crossing sign at the Rock Street grade crossing. While deemed immaterial, the longitudinal pathway extends along the track on either side of Rock Street as shown by the above exhibits. The area is shown by a blueprint (Pl. Ex. 1, p. 421).

[2] Plaintiff stated the distance as about two feet (fols. 109-112, 180) while others placed the pathway right up against the ties (fols. 320-2, 334-8, 403, 417-8, 443-9, 473-4, 508, 589-598).

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IN THE

Supreme Court of the United States

OCTOBER TERM—1937.

No. 367

ERIE RAILROAD COMPANY (a New York Corporation),

Petitioner,

against

HARRY J. TOMPKINS.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT AND BRIEF IN SUPPORT THEREOF.

WILLIAM C. CANNON,
THEODORE KIENDL,
HAROLD W. BISSELL,
Counsel for Petitioner.

THE BALLOU PRESS NEW YORK

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of Appeals for the Second Circuit commanding said court to certify and send to this Court on a day to be determined a full and complete transcript of the record of all of the proceedings of such Circuit Court of Appeals had in this case, to the end that this cause may be reviewed and determined by this Court, that the judgment of the Circuit Court of Appeals be reversed, and that the petitioner may be granted such other and further relief as may seem proper.

Dated, August 31, 1937.

ERIE RAILROAD COMPANY,
By WILLIAM C. CANNON,
THEODORE KIENDL,
HAROLD W. BISSELL,
Counsel for Petitioner.

BRIEF IN SUPPORT OF PETITION.

Preliminary Matters.

Opinion Below.

The opinion of the Circuit Court of Appeals for the Second Circuit may be found in the record at pages 496-501. It is reported in 90 Fed. (2nd) at page 603.

Jurisdiction.

The judgment of the Circuit Court of Appeals now sought to be reviewed was entered on June 14, 1937 (pp. 501-502).

The statutory provision which is believed to sustain the jurisdiction of this court is Section 240(a) of the Judicial Code as amended by the Act of February 13, 1925, Ch. 229, sec. 1; 43 Stat. 938; 28 U. S. C. A. sec. 347(a).

Statement of Case.

The principal facts have been summarized in the petition, *supra,* at pages 2 to 6.

A summary of the argument is given in the Index.

Statutes Involved.

The question of the obligation of the federal courts to follow the Pennsylvania law as declared by the Pennsylvania courts is affected not only by principles of comity but by the Rules of Decision Act (Act of September 24, 1789, c. 20, sec. 34, 1 Stat. 92, as revised; Rev. Stat. sec. 721; 28 U. S. C. A., sec. 725), which provides:

> "The laws of the several States, except where the Constitution, treaties, or statutes of the United States other-

wise require or provide, shall be regarded as rules of decision in trials at common law, in the courts of the United States, in cases where they apply."

SPECIFICATION OF ERRORS TO BE URGED.

1. The Circuit Court of Appeals erred in refusing to apply the established law of Pennsylvania with respect to the standard of care owed by a railroad to persons on a longitudinal pathway (as distinguished from a crossway) on the railroad's right of way. This question was presented below (defendant's objection fols. 123-4; defendant's motions, fols. 638-640, 1201, 1253-4, 1426; defendant's request No. 1, fols. 1213, 1243-4; Court's charge re license and trespass, fols. 1227, 1232-5; defendant's exception thereto, fols. 1249-1250; assignment of errors Nos. 1, 2, 3, 4, 5, 10, 15, fols. 1451-1469).

2. The Circuit Court of Appeals erred in refusing to hold the plaintiff guilty of contributory negligence as a matter of law, and in applying an unsound and prejudicial rule to determine whether the question of contributory negligence was one of fact or of law. This question was presented below (defendant's motions, fols. 638-640, 1201, 1253-4, 1426; defendant's requests Nos. 6, 9, 10, fols. 1215-8, 1245-7; Court's charge, fols. 1230, 1234-5; assignment of errors Nos. 1-4, 9, 16-18, fols. 1451-3, 1461, 1470-2).

Point I. The Courts below erred in refusing to apply the Pennsylvania Law repudiating the Doctrine of Permissive Pathways other than crossings on a railroad's right of way.

As shown in the petition, the plaintiff, when the accident in suit occurred, was on the defendant's right of way in Pennsylvania, and was walking on a longitudinal pathway alongside the track as distinguished from a crossing over the track.

The decisions below have gone against the defendant on the theory that there is a rigid line of demarcation between questions of local law and questions of general law, that while questions of local law are determinable by the local courts questions of general law are determinable by the federal courts according to their own judgment unaffected by decisions of the local courts, that standards of care owed by a railroad are questions of general law, and that the federal courts affirm the doctrine of permissive pathways, whether crossings or not, regardless of the Pennsylvania decisions.

We think this reasoning rests on an over-simplified rule of thumb, that it is unsound in principle, that it is at variance with the far more flexible doctrine expressed in the considered opinions of this Court, and that it has led to an erroneous and flagrantly unjust conclusion in the present case. It is believed that the problem is of such outstanding importance and marked by such diversity of opinion among the various Circuit Courts of Appeals as to merit the consideration of this Court.

A. The Federal Courts are Bound to Apply the Law of Pennsylvania as the *lex loci delicti*.

It is a thoroughly established principle of conflict of laws that, in tort actions, the *lex loci delicti* governs as to the incidents of negligence such as the standard of care. Since the principle is elementary, we do no more than cite Restatement, Conflict of Laws, §380, page 462, for a statement of the rule.

Whatever difficulties there may be in ascertaining the pertinent Pennsylvania law, or more particularly, in fixing the extent to which the federal courts are bound to recognize the pertinent decisions of the Pennsylvania courts, it is settled beyond question that it is the Pennsylvania law

mates is unimportant in the light of the undisputed fact that fixed structural parts of the train extended as much as one foot and five inches beyond the ties (fols. 775-791, 512-3, 546-7). Plaintiff conceded he knew that the train extended beyond the ties (fols. 181-4), and conceded further that his right side was possibly within a foot of the side of the train (fols. 185-8). To avoid being hit, plaintiff knew that he had to walk on the far side of the two-foot path (fols. 178, 340-4, 373, 379, 547-551). In his bill of particulars, plaintiff charged defendant with negligence in permitting the pathway "to be located so close to its tracks as to be dangerous to life and limb" (fol. 82). The plaintiff's long familiarity with the pathway and its surroundings was conceded (fols. 103, 156-7, 165, 176). The train was moving at a rate of 8 to 10 miles an hour according to defendant's witnesses (fols. 1027, 1117-9, 1155-9, 1184, 1188, 1199), about 30 to 35 miles an hour according to plaintiff (fols. 187-191).

As bearing further on the question of plaintiff's negligence, it should be noted that he could readily have avoided all danger. In the first place, he could have reached his home, without inconvenience, by the regular public thoroughfares (fols. 131, 234-242). In the second place, having chosen to use the pathway along the track, he could readily have stepped aside to a position of safety (fols. 168-178, 105-6, 109, 153-4, 380-1, 507-8, 511; Pltf.'s Exs. 2, 3, 5, 6, at pp. 423, 425, 429, 431; Deft.'s Exs. A to D at pp. 434-461; and see Circuit Court's statement that any contrary contention was "patently absurd", p. 499).

The plaintiff testified that, after the engine had passed him and he was continuing on the pathway with no light at all (fols. 178-9) he was hit by "a black object that looked like a door to me" and had the dimensions of a door (fols. 141, 207, 254-260). This trial version, it may be noted, contradicted the plaintiff's prior sworn statement in his bill of discovery (instituted to obtain information for a bill of particulars herein) that the projection could not be seen in the darkness and that he was "unable to state" and "does not

know what object the defendant permitted to project from the said train, much less the dimensions, its nature and its location on the train" (fols. 42, 48-50). This bill of discovery version, if reaffirmed on the trial, would have barred a recovery (*McCarthy* v. *New York New Haven & Hartford R. R. Co.*, 240 Fed. 602, C. C. A. 2, 1917); but on the trial plaintiff disposed of it by the simple expedient of testifying that, in this as in other respects, his verified bill of discovery was false (fols. 210-8; and see fols. 189, 194-201, 210-4, 225, 243, 248-253).

Two other factual matters remain to be noted in connection with the applicability of the Pennsylvania law which, as above stated, repudiates the doctrine of permissive longitudinal pathways, as distinguished from permissive crossings, and renders the railroad liable only for wilful or wanton injury.

First, there was no evidence of wilful or wanton negligence on defendant's part. The only evidence of negligence on defendant's part consisted in plaintiff's vague testimony of being struck by a projection which looked like a door to him (fols. 141, 256-260). There was no evidence of negligence in inspection, no evidence that the defendant knew of any loose door if there was one; and it affirmatively appeared without dispute that the plaintiff was not seen and that no employee or representative of the defendant knew of the accident until some time after it occurred (fols. 1166-8, 1185, 1189, 1200). Indeed, it is doubtful, to say the least, whether any question of negligence on defendant's part should have gone to the jury, irrespective of the Pennsylvania law;[1] but, in any case, there was no evidence of the wilful or wanton negligence essential under the Pennsylvania law in order to render the railroad liable.

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[1] Not only was plaintiff's testimony as to a projecting door too vague to be credited, but, even if credited, the mere fact of a loose door would be insufficient to put the rule of *res ipsa loquitur* into operation (*Musto* v. *Lehigh Valley R.R.*, 192 A. 888, Penn. Supreme Court, June 25, 1937; *Texas & N. O. R. Co.* v. *Smith*, 285 S. W. 913, Tex. Civ. App.)

Second, in his briefs below, the plaintiff made a belated effort to escape the Pennsylvania law by picturing the accident as a crossing accident rather than a longitudinal pathway accident. The contention is that the plaintiff, in walking along the longitudinal pathway, had arrived precisely at the intersection of the longitudinal pathway with the diagonal crossway and hence that defendant, even under Pennsylvania law, was under the duty of due care applicable to persons on permissive crossings. Apart from this asserted arival at the point of intersection, there is no pretense that the plaintiff used the pathway crossing the tracks or even that he intended to use it except after turning away from the longitudinal pathway and from the tracks in order to reach Hughes Street. But, in any case, the asserted arrival at the diagonal pathway was disputed, the jury could have found that plaintiff did not arrive there, and the charge to the jury made no discrimination in this regard (fols. 1219-1250) nor did the opinion of the Circuit Court of Appeals make any such discrimination. Further considerations which are believed to dispose of any contention that this was a crossing accident are set forth in the footnote.[1]

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[1] Plaintiff testified that he continued on the longitudinal pathway after he heard the whistle and saw the headlight, that he "got to almost where the paths joined, all but a few steps" when the engine passed him, and that he had "got right on the [diagonal] path" when he was hit (fols. 140-1, 274-6). But on further examination, his testimony was that he was "on the verge" of turning onto the diagonal path, that his "next step was to be" down the diagonal path (fol. 279), but that he "had not started turning into" the diagonal path (fol. 302). Plaintiff's witnesses Colwell and McHale testified that they found the plaintiff lying six to ten feet short of the diagonal path (fols. 331-2, 429-430), but on cross-examination McHale could not deny that the plaintiff's body might have been 75 feet nearer to Rock Street or that he had so indicated to a representative of the defendant named Dineen (fols. 432-4).

Further, it may be noted that the complaint described the accident as occurring exclusively on the longitudinal pathway (fols. 12-14); that plaintiff's verified bill of discovery described the accident as occurring on the "parallel" pathway (fol. 41); that plaintiff's bill of particulars

First Question Presented.

With respect to the standard of care owed by the defendant railroad to the plaintiff, the trial court refused to apply the established Pennsylvania law (as laid down in *Falchetti* v. *Pennsylvania R. Co.*, 307 Pa. 203, 160 A. 859, and other cases cited in the brief *infra* pp. 16-17) to the effect that the doctrine of permissive pathways along a railroad's right of way (as distinguished from permissive crossings) is not recognized in Pennsylvania and that, in consequence, the only obligation of the railroad is to refrain from wilful or wanton negligence.[1]

On the contrary, the trial court, in direct contravention of the Pennsylvania law, charged that a permissive longitudinal pathway could be found by the jury and that the defendant, in that event, owed a duty of reasonable care to the plaintiff as a licensee (citation to the charge, *supra*).

The Circuit Court of Appeals upheld the District Court in this respect, expressly stating that it was not necessary even to "go into" the question of Pennsylvania law since the mat-

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claimed that the accident occurred on the longitudinal pathway "about 60 feet" from the Rock Street crossing (fols. 81-82) which would be some 55 feet short of the diagonal pathway (see p. 3, footnote 1, *supra*) and that the defendant's negligence was in respect of the longitudinal pathway (fol. 82). Despite plaintiff's testimony that he was "on the verge" of turning into the diagonal pathway, the accident is properly to be characterized as a longitudinal pathway accident rather than a crossing accident inasmuch as the plaintiff was concededly walking on the longitudinal pathway, some distance short of the diagonal crossway, as the train approached and as the engine passed him. Furthermore, even if the diagonal pathway were a material factor in the case, it is to be noted that it was a winding path, crossing the track at a considerable angle, continuing diagonally across a field and over a hill (fols. 103, 113, 121-130, 154-6, 270, 323-5, 349-354, 403-4, 406, 435-6, 558-9, 568; Pl. Ex. 1, p. 421); and thus even this path was of the general type as to which the Pennsylvania law denies a permissive way (see Pennsylvania cases in brief, *infra*, pp. 16-17).

[1] Defendant's objection, folios 123-4; defendant's motions, folios 638-640, 1201, 1253-4, 1426; defendant's request No. 1, fols. 1213, 1243-4; court's charge re license and trespass, fols. 1227, 1232-5; defendant's exception thereto, fols. 1249-1250; assignment of errors Nos. 1, 2, 3, 4, 5, 10, 15, folios 1451-1469.

ter was one of "general law" and therefore subject to the independent judgment of the federal courts (pp. 497-8).

The first question, therefore, is whether the courts below are not in error in refusing to apply the Pennsylvania law as unequivocally declared, prior to the accident in suit, by the highest court of that state.

Second Question Presented.

The trial court refused to hold that the plaintiff was guilty of contributory negligence as matter of law, despite plaintiff's own testimony that he was deliberately and unnecessarily walking, on a very dark night, on a wholly unilluminated path alongside defendant's track with his right side within possibly one foot of a moving train.[1]

The Circuit Court of Appeals upheld the trial court in this respect in spite of the fact that the plaintiff's conduct seemed "imprudent" to them—and in such a degree that it would have seemed imprudent to them "even to stand" so close to the moving train (p. 499).

While petitioner does not expect this Court to determine just how many inches contributory negligence extends, as matter of law, beyond the side of a moving train, it is believed that the courts below have gone to such an extreme as virtually to exclude contributory negligence as matter of law from cases of this nature. But, more than this, it is believed that the Circuit Court of Appeals applied an unsound and highly prejudicial test in arriving at the conclusion that the question of contributory negligence was for the jury.

The court said that, while the plaintiff's conduct seemed imprudent to them, the fact that recoveries had been allowed under circumstances deemed by them to be "closely similar" indicated that fairminded men might hold a different view

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[1] Citations, *supra*; defendant's motions, fols. 638-640, 1201, 1253-4, 1426; defendant's requests Nos. 6, 9, 10, fols. 1215-8, 1245-7; court's charge, fols. 1230, 1234-5; assignment of errors Nos: 1-4, 9, 16-18, fols. 1451-3, 1461, 1470-2.

than their own, and that this was "enough to preclude taking the issue from the jury" under the rule of *Richmond & Danville R.R.* v. *Powers*, 149 U. S. 43, 45, and *Texas & Pac. Ry. Co.* v. *Harvey*, 228 U. S. 319 (pp. 499-500).

The test of contributory negligence implicit in this reasoning (as more fully developed in the brief, *infra*, pp. 33-35) is a distortion of the rule stated by this Court in the cited cases; it involves a definite fallacy in logic; and this fallacy, in the light of the Circuit Court's express view that the plaintiff was negligent, would seem to be the only basis on which the Circuit Court could have reached its conclusion adverse to defendant.

The Supreme Court rule is that the question is for the jury if fairminded men might reach different conclusions as to the existence of contributory negligence; but the rule here applied by the Circuit Court of Appeals is that the question is for the jury if *other courts have thought that* fairminded men might reach different conclusions. The effect of the rule applied by the Circuit Court of Appeals is that the judgment of the courts which have been the most extreme in their doubts as to what fairminded men might conclude becomes the criterion for all other courts.

Reasons for the Granting of a Writ of Certiorari.

1. The Circuit Court of Appeals has decided an important question of local law in direct contravention of applicable local decisions.

The case involves the question of the standard of care owed by a railroad to persons on longitudinal pathways (as distinguished from crossways) on the railroad's right of way within the State of Pennsylvania.

The highest court in Pennsylvania, prior to the accident here in suit, had unequivocally declared that, whatever the rule might be in other states, Pennsylvania refused to recognize permissive longitudinal pathways and hence held rail-

roads liable only for wilful or wanton negligence. *Falchetti* v. *Pennsylvania R. Co.*, 307 Pa. 202, 160 A. 859 (1932), *supra;* and other cases cited in the brief, *infra*, pages 16-17. There was no evidence of wilful or wanton negligence in the present case and, in any event, the jury was permitted to find the defendant liable for ordinary negligence.

While the cases are not altogether clear in defining the line between local law and general law, it is believed that the above question comes well within the scope of local law. It relates to a standard of care exclusively in respect of Pennsylvania property. The Pennsylvania rule is based on a local public policy adverse to burdening railroads with obligations which would render "most difficult, if not impracticable" "a proper operation of trains for the convenience of the public". The Pennsylvania rule is presumably the outgrowth of local conditions, such as the congestion of population and railroad traffic in a highly industrialized state. The Pennsylvania cases have established the rule with such definiteness that it must be regarded as a "rule of conduct" in Pennsylvania.

2. The Circuit Court of Appeals has decided a federal question in a way believed to be in conflict with applicable decisions of this Court.

The first reason above assigned for the granting of a writ involves the federal question as to whether the federal courts, under the Rules of Decision Act (28 U. S. C. A., section 725) or under principles of comity, are under obligation to follow the applicable state law as established by decisions of the highest court of the state. Decisions of this court deemed to be contrary to the holding of the Circuit Court of Appeals are cited in the brief (*infra*, pp. 21-30).

3. The Circuit Court of Appeals has rendered a decision in conflict with the decisions of other Circuit Courts of Appeals on essentially the same matter.

Leaving other instances of conflict for the brief, it is deemed sufficient to cite here the case of *Boston & Maine Rd.* v. *Breslin,* 80 Fed. (2d) 749, cert. den. 297 U. S. 715 (decided in 1935 by the Circuit Court of Appeals for the First Circuit.) The question was there raised as to the standard of care owed by a railroad to a child injured on the railroad's turntable in Massachusetts. As the Pennsylvania courts refuse to recognize the doctrine of permissive longitudinal pathways on a railroad's right of way, so the Massachusetts courts refuse to recognize the doctrine of attractive nuisances on a railroad's property. But in the *Breslin* case, the Circuit Court of Appeals for the First Circuit deemed itself bound by the Massachusetts rule despite the contrary rule more generally prevailing in other states.

4. The Circuit Court of Appeals has decided an important question of general law in a way deemed untenable and in conflict with the weight of authority.

It is an important rule of general law that the question of contributory negligence is one of law and not of fact when, in the judgment of the court, fairminded men might reach different conclusions as to the existence of such negligence. *Richmond & Danville Rd. Co.* v. *Powers,* 149 U. S. 43, 45, *supra; Texas & Pac. Ry. Co.* v. *Harvey,* 228 U. S. 319, *supra.*

Although purporting to follow this rule, the Circuit Court of Appeals has actually applied the very different rule—different in logic and result—that the question is one of fact, not if fairminded men might differ, but if other courts have thought that fairminded men might differ. Under the untenable rule applied by the Circuit Court of Appeals, the courts which are most extreme in their doubts as to the conclusions which fairminded men might reach establish the criterion for all other courts to follow.

For the reasons above outlined, your petitioner prays that a writ of certiorari issue to the United States Circuit Court

which the federal courts, quite as truly as the state courts, are bound to ascertain and apply. There is no such thing as a federal common law applicable in such cases. *Bucher* v. *Cheshire Rd. Co.*, 125 U. S. 555, 583-4; *Smith* v. *Alabama*, 124 U. S. 465, 478-9.

Accordingly, the standard of care owed by the defendan in the present case is that prescribed by the law of Pennsylvania, however that law may be ascertained.

B. THE LAW OF PENNSYLVANIA, AS ESTABLISHED BY THE HIGHEST COURT OF THE STATE PRIOR TO THIS ACCIDENT, REJECTS THE DOCTRINE OF PERMISSIVE PATHWAYS WITH RESPECT TO PATHWAYS ALONG A RAILROAD'S RIGHT OF WAY AS DISTINGUISHED FROM CROSSINGS.

Before considering the extent to which the Pennsylvania decisions should influence the federal courts, we here set forth an analysis of those decisions. Since the accident in suit occurred in July, 1934, it will be observed that the Pennsylvania decisions relate to the Pennsylvania law as established prior to the accident.

In *Falchetti* v. *Penn. R. Co.*, 307 Pa. 203, 160 A. 859 (1932), a case of injury to a child walking on an alleged permissive pathway on a railroad's right of way, alongside the tracks, the Court said that "an alleged permissive way parallel with plaintiff's tracks and on its right of way, as distinguished from a permissive crossing over them, is not recognized in this State." Referring to the cases cited to it as contra, the Court said further: "So far, if at all, as they tend to sustain the right to continue such a use, they must be considered as overruled by the *Conn* and *Kolich* cases."

The Pennsylvania rule thus declared, as shown by the group of Pennsylvania cases cited below, is apparently based on two conceptions. The first is that it cannot be supposed

that a railroad, merely by failing to take effective prohibitory steps, is consenting to the use of its right of way upon other than well-defined crossings. The second is that the doctrine of permissive use of longitudinal pathways, as distinguished from crossings, would conflict with the public interest since the obligation to take due precautions in such cases would render "most difficult, if not impracticable" "a proper operation of trains for the convenience of the public" (*Tiers* case at p. 490). *Tiers* v. *Penn. R. Co.*, 292 Pa. 522, 141 A. 487 (1928); *Gray* v. *Penn. Rd. Co.*, 293 Pa. 28, 141 A. 621 (1928); *Conn* v. *Penn. R. Co.*, 288 Pa. 494, 136 A. 779 (1927); *Kolich* v. *Monongahela Ry. Co.*, 303 Pa. 463, 154 A. 705, (1931); *Koontz* v. *B. & O. R. Co.*, 309 Pa. 122, 163 A. 212 (1932); *Lindsay* v. *Glen Alden Coal Co.*, 318 Pa. 133, 177 A. 751 (1935), citing the *Falchetti* case with approval.

It is apparent that the factor of public interest is affected by local conditions such as the congestion of population and railroad traffic in a highly industrialized state.

This conception of the standard of care owed by railroads, and of the public interest or public policy involved, was foreshadowed in the case of *Thompson* v. *B. & O. R. Co.*, 218 Pa. 44, 67 A. 768 (1907). That was a "turntable case" in which evidence was offered that children were accustomed to go through a fence onto the railroad property. After considering *Railroad Co.* v. *Stout*, 84 U. S. 657, and other cases upholding the "attractive nuisance" doctrine, the court disapproved of the doctrine, declared that the trend was against it, and thereupon repudiated it, holding that the intruders were trespassers rather than licensees and that the only obligation of the railroad was to refrain from willful or wanton injury. The court observed that a duty of due care in such cases would impose, for the benefit of intruders, an unreasonable restraint upon the beneficial use of land.

In their brief below, plaintiff's counsel attempted to discredit the *Falchetti* decision by citing a number of prior

Pennsylvania decisions deemed to sustain a different rule. If these cases were contra, they were manifestly overruled by the *Falchetti* case. But the brief comments on the cited cases given in the footnote, will sufficiently indicate their inapplicability.[1]

Certainly, so far as it lies within the power and vocabulary of the Pennsylvania Supreme Court to establish a Pennsylvania rule of action and conduct for pedestrians and railroads with respect to longitudinal pathways along a right of way in Pennsylvania, that Court has done so in the *Falchetti* case.

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[1] *Kay* v. *Penn. Rd. Co.*, 65 Pa. 269, 3 Am. Rep. 628 (1870). The site of the injury was a large open lot, traversed by sidings, used for the storage of lumber and open to the public in connection therewith. In holding that there was proper evidence of permissive use, the Court said, "It is not like those portions of the road used solely for the passage of trains, where the company would have not only the right to demand, but reason to expect, a clear track."

Taylor v. *Del. & H. Canal Co.*, 113 Pa. 162, 8 A. 43 (1886). This case involved a permissive crossing, not a longitudinal pathway.

Lodge v. *Pittsburgh, etc. R. Co.*, 243 Pa. 10, 89 A. 790 (1914). This case also involved a well-defined permissive crossing.

Francis v. *B. & O. R. Co.*, 247 Pa. 425, 93 A. 490 (1915). A careful reading of the case discloses that it involved what was essentially a permissive crossing. The decision rested on the *Kay* case, *supra*, as "exactly in point".

O'Leary v. *Pittsburgh, etc. R. Co.*, 248 Pa. 4, 93 A. 771 (1915). The injury occurred on a plot used as a playground, partly public and partly railroad property, with no visible separation line. In admitting evidence of permissive use, the Court cited *Steele* v. *Lake Shore, etc. R. Co.*, 238 Pa. 295, 86 A. 201 (1913), which was a permissive crossing case.

Counizzarri v. *Philadelphia, etc. Ry. Co.*, 248 Pa. 474, 94 A. 134 (1915). The accident occurred on a permissive strip of the right of way, used as a street, walk and playground, and fronted by private houses having no other access. The decision rested on the *O'Leary* case, *supra*.

Slamovitz v. *Penn. R. Co.*, 266 Pa. 63, 109 A. 544 (1920). The accident occurred on "26th Street", a public street on which the railroad had a siding.

Kremposky v. *Mt. Jessup Coal Co.*, 266 Pa. 568, 109 A. 766 (1920). The accident occurred on a trestle for coal cars, on the coal company's private property; the Court held that a permissive way over the trestle could be shown.

C. THE FEDERAL COURTS ARE BOUND TO FOLLOW THE PENNSYLVANIA DECISIONS, DEFINING THE APPLICABLE LAW PRIOR TO THE ACCIDENT IN SUIT, BECAUSE THE DECISIONS ESTABLISH A RULE OF ACTION AND CONDUCT IN PENNSYLVANIA AND RELATE TO A MATTER LOCAL IN NATURE.

Under the Pennsylvania law as established by the Supreme Court of that State, the longitudinal pathway on which the plaintiff was walking could not be recognized as permissive (such recognition being restricted to crossings); hence the plaintiff was a trespasser and hence the standard of care imposed upon the railroad would be merely that of refraining from wanton negligence or wilful injury.

Ignoring the Pennsylvania law as so established, the District Court in this case permitted the jury to find that the plaintiff was walking on a permissive longitudinal pathway, and the charge was to the effect that plaintiff was in that event a licensee, and that the railroad was under an obligation to use due care toward him as such licensee (fols. 1213-4, 1226-8, 1231-4).

In sustaining the District Court, the Circuit Court of Appeals regarded it as unnecessary to "go into" the question of Pennsylvania law because the Court, in conformity with what it deemed to be "the great weight of authority in other states", approved the conception that the doctrine of permissive ways embraces longitudinal pathways as well as crossings (pp. 497-8).

The opinion is clearly erroneous in so far as it purports to apply some supposed federal common law of negligence; but the point now urged is that, even if the opinion be interpreted as recognizing that Pennsylvania law governs, it is erroneous in principle and in result in its method of determining the Pennsylvania law.

The opinion of the Circuit Court of Appeals manifestly rests on two propositions. The first is that questions of law divide into two rigid categories with respect to their subject matter, questions of general law and questions of local law; and that on questions of general law the federal courts are

independent of state court decisions, with an independence so absolute that the federal courts may apply an approved rule of law no matter how definitely and firmly the state courts may have established a contrary rule. The second proposition is that "the question of the responsibility of a railroad for injuries caused by its servants [including the question of a railroad's responsibility to persons on a longitudinal pathway along the right of way] is one of general law" (pp. 497-8). It is on the strength of these two propositions that the Circuit Court of Appeals has imposed a rule of law contrary to that established by the Peinnsylvania courts.

We think the opinion of the Circuit Court of Appeals is typical of many ill-fated attempts to compress into inflexible rules of thumb the broad principles declared and applied by this Court.

The precise scope of the Rules of Decision Act may be doubtful in view of the holding that the "laws of the several States" do not include state court decisions as such (*Swift* v. *Tyson,* 16 Pet. 1); but whether by virtue of the Act or of comity, it is well settled that such decisions are controlling under certain circumstances. The extent to which the federal courts are bound to follow state decisions, as shown by innumerable cases, is determined partly by the definiteness and finality with which such decisions have established the contested rule of law and partly by the extent to which the contested rule is general or local in nature and effect. We think that this court, refusing to adopt rigid rules as determinants, has treated the factors of establishment and general or local quality as matters of degree; and that it applies more severe and critical tests of establishment according as the state rule is more general in nature and effect, less severe and critical tests according as the state rule is more local in nature and effect.[1]

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[1] We think this is a correct statement of the broad principles applied by this Court, that it is sound in theory, and that it furnishes the fundamental answer to the many criticisms of the doctrine of *Swift* v. *Tyson* and following cases.

(1) ***The Pennsylvania rule is sufficiently established to be controlling, even if the question be regarded as mainly one of general law.***

It is obvious that the standard of care with regard to a pathway along a railroad's right of way in Pennsylvania is in some degree a local matter. But, even if the question could be regarded as general or predominantly general in nature, the Pennsylvania rule is established with sufficient definiteness and finality to be controlling.

It may be noted, in the first place, that, even in cases where an asserted rule of the state courts has been rejected, it is frequently stated or implied that the asserted rule would govern if sufficiently established.

In *Swift* v. *Tyson*, 16 Pet. 1, *supra*, Mr. Justice Story justified the exercise by federal courts of an independent judgment on a question of "general law" relating to the law of negotiable instruments on the ground that decisions are not the law but merely evidence of the law and are "often reexamined, reversed and qualified" by the state courts themselves (p. 18). The argument has been frequently repeated. But this reasoning would seem to carry the implication that, as a matter of comity at least and, we think, by virtue of the Rules of Decision Act as well, the federal courts are bound to recognize laws where the evidence in the form of state decisions is sufficiently conclusive, in other words, when the contested rule is established with sufficient definiteness and finality.[1] Obviously, the evidence of the Pennsylvania rule now in question is conclusive.

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[1] In the *Swift* case, while discussing the problem on the assumption that the contested rule had been "fully settled in New York", the Court in fact considered it doubtful if any doctrine on the question could be "treated as finally established" by the New York courts and "certain" that the highest court had not pronounced "any positive opinion upon it" (pp. 17-18). So, in *Barber* v. *Pittsburgh, etc. Ry. Co.*, 166 U. S. 83, this Court considered that the one state case relied upon was "not conclusive evidence of the law of the state" (p. 100).

In further justification of the exercise of an independent judgment by federal courts on a question of general law, this Court observed in the *Swift* case that the federal and state courts have the like function of ascertaining the governing rule by "general reasoning and legal analogies" in accordance with principles and doctrines of general jurisprudence (p. 19); and this statement was preceded by the particular observation that the courts of New York, the state there involved, resorted to "the general principles of commercial law" for a solution and did not found their decisions upon any fixed local usage (p. 18). Here again the implication would seem to be that the federal courts would follow the state rule if established with such definiteness and finality that the state courts would no longer resort to the general sources of the common law or to general reasoning and legal analogies, but would regard the question as foreclosed in the state.

The equivalent statement that the federal and state courts, in matters of general law, go to the "same sources" to ascertain the applicable rule has repeatedly been made by this Court in justifying the federal courts in exercising an independent judgment. But we think an analysis of such cases shows the meaning to be that the state courts, upon questions of the sort at issue, *in fact* go to the same sources, not that they are *bound* to go to the same sources. When the question of state law is sufficiently open so that it may fairly be said that the state courts themselves would regard it as one of general law to be solved by resorting to these common sources, then the federal courts are manifestly justified in making an independent investigation and determination. But this Court has repeatedly indicated that when the question of state law has been decided with such definiteness and finality as to have established a rule of property, action or conduct in the state, that is, with such definiteness and finality that it can no longer fairly be said that the state courts

would resort to the common sources and principles of jurisprudence, then the question is *ipso facto* removed from the domain of general law and the federal courts will thereupon recognize the established state rule.

This Court has so indicated in many cases where the conclusion was that there was no state rule so firmly established as to exclude resort to general principles. Thus in *Black and White Taxicab Co.* v. *Brown and Yellow Taxicab Co.*, 276 U. S. 518, involving the validity of a Kentucky contract, it was said that federal and state courts would go to the same sources to ascertain "the existing applicable rule," or "for evidence" of that rule or "for the discovery of common law principles" (pp. 529-530); it was noted that Kentucky had adopted the common law and that her courts recognized its principles; and it may be noted that the Kentucky courts resorted to those principles in the cases cited on the question.

Similar implications are to be found in many other cases, including the following which were cited in the *Taxicab* case: *Carpenter* v. *Providence Washington Ins. Co.*, 16 Pet. 495, 511-2; *Lane* v. *Vick*, 3 How. 464; *Chicago* v. *Robbins*, 67 U. S. 418, 428-9; *Yates* v. *Milwaukee*, 10 Wall. 497; *New York Central Rd. Co.* v. *Lockwood*, 17 Wall. 357, 363, 367-8. In the *Yates* case, in refusing to follow a Wisconsin case, the Court particularly noted that the Wisconsin case established no governing principle of law and that the Wisconsin courts would themselves decide similar cases by resort to general principles.

In *Baltimore & Ohio Rd. Co.* v. *Baugh*, 149 U. S. 368, in justifying an independent judgment on a negligence question as one of general law, it was noted that the Ohio courts deduced their rule from general principles and were not wholly satisfied with the rule (pp. 376-8), and that it was not a case of an established Ohio rule of property and action, which would be regarded as authoritative both by federal and state

courts (pp. 371-2). Quoting from *Burgess* v. *Seligman*, 107 U. S. 20, 33-4, the Court recognized a duty to exercise an independent judgment "in cases not foreclosed by previous adjudication" (pp. 372-3).[1]

In *Burgess* v. *Seligman*, 107 U. S. 20, *supra*, and *Kuhn* v. *Fairmont Coal Co.*, 215 U. S. 349, certain state decisions were deemed not controlling, primarily because they were not rendered until after the transactions in suit occurred and after the rights accrued (a point not here involved). It was stated, however, that "rules of property and action", established by state courts in "the ordinary administration of the law", have "all the effect of law" and "are always regarded by the Federal courts, no less than by the State courts themselves, as authoritative declarations of what the law is." It was further said that where the state law has not been thus settled, it is the right and duty of the federal court to exercise its own judgment, "as it also always does when the case before it depends upon the doctrines of commercial law and general jurisprudence" (*Kuhn* case, pp. 360, 358; *Burgess* case, p. 33).

We think that isolated expressions such as that last quoted may not properly be seized upon to support the theory, espoused by the Circuit Court of Appeals in the present case, that there are certain unalterably bounded subject matters as to which state decisions may never control. Obviously, a case is not regarded as depending "upon the doctrines of commercial law and general jurisprudence" when the applicable state rule is established by state statute, even though the statute deals with a matter which but for the statute would unquestionably come within the scope of commercial

[1] As hereafter pointed out, the question at issue in the *Baltimore & Ohio* case was not local in any such sense or degree as the question at issue in the present case. The immediate point is that the Pennsylvania courts have foreclosed the question now at issue, as a question of Pennsylvania law.

law and general jurisprudence.[1] It would seem equally obvious that a case is not to be regarded as depending "upon the doctrines of commercial law and general jurisprudence" when there is an applicable state rule of property, action or conduct *definitely and finally established, as such* by decisions of the highest state court, even though the decisions deal with a matter which but for such established rule would unquestionably come within the scope of commercial law and general jurisprudence.

In attempting to frame and apply an inclusive rule based on the distinction between "general law" and "local law", a number of federal courts including the Circuit Court of Appeals in the present case have failed to note that "local law", if it is to be the criterion in any such rule, must be construed as including not only state rules of law upon matters inherently local in nature or subject matter but also state rules of law which are local only in the sense that they are peculiarly established in the state, whether by statute or by decisions. Thus, state statutes and their construction by state courts are included among "state laws strictly local", regardless of whether the subject matter is general or local (Mr. Justice Story in *Swift* v. *Tyson,* 16 Pet. 1, 18), and state court decisions have been viewed as transforming into local law what otherwise would be called general law. Thus, in the frequently cited case of *Snare & Triest Co.* v. *Friedman,* 169 Fed. 1 (cert. den. 214 U. S. 518), involving a general question of the law of negligence, the Court refused to follow a particular state decision because it was not regarded as establishing a rule of conduct on the subject, but said (p. 12):

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[1] And it is settled by the more recent cases in this Court that this is true even though the state courts characterize the statute as declaratory of the common law (as in statutes adopting the uniform negotiable instruments law) while adopting a construction at variance with the federal court's conception of the pertinent doctrines of commercial law and general jurisprudence. *Burns Mortgage Co.* v. *Fried,* 292 U. S. 487; *Marine Bank* v. *Kalt-Zimmers Co.,* 293 U. S. 357.

> "And as to what the common law of a state may be, the best evidence is generally found in the settled line of decisions of the state court, so accepted and recognized as to constitute a general rule of property or conduct. More latitude, however, is practiced in questions that depend upon a common law, not merely part of the local and customary law of the state, but common to all states and countries where what is known as the 'common law' prevails. On these questions, the courts of the United States do not hold themselves bound by the decisions of the courts of the state, unless, perchance, such decisions have so clearly established a settled rule in the premises as to make it part of the peculiar and local law of that state."

However strongly this Court has felt the desirability of uniformity in matters of a general nature and however reluctant it has been to recognize non-conformist state rules as settling the question of state law, it has nevertheless recognized such rules as controlling when established, by state court decisions, with sufficient definiteness and finality to constitute rules of property, action or conduct.

In *Bucher* v. *Cheshire Rd. Co.*, 125 U. S. 555, the asserted Massachusetts rule was that a plaintiff could not recover for a railroad's negligence when the injury occurred while the plaintiff was illegally travelling in Massachusetts on Sunday. After discussing the general question at length and pointing out that "there is no common law of the United States", this Court said (pp. 583-4):

> "It is in regard to decisions made by the state courts in reference to this law, and defining what is the law of the State as modified by the opinions of its own courts, by statutes of the State, and the customs and habits of the people, that the trouble arises."

The conclusion was that the Massachusetts decisions had adequately established the asserted rule to render it controlling.[1]

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[1] Although incidentally involving a state statute, the question was one of common law, as noted by Judge Taft in *Byrne* v. *Rd. Co.*, 61 Fed. 606.

In *Hartford Insurance Co.* v. *Chicago etc., Ry. Co.*, 175 U. S. 91, there was involved the question of the validity of a contract exempting the railroad from liability for fire with respect to a warehouse on its property in Iowa. The lower federal courts deemed the contract void as against public policy, despite state decisions to the contrary. This Court, citing the *Burgess* case, *supra*, among others, held that the matter of public policy was for the state to determine, and that the state decisions had adequately established the asserted Iowa rule.[2]

If the present question is to be regarded as a general question of Pennsylvania common law and public policy, the Pennsylvania decisions have manifestly established the Pennsylvania rule with sufficient definiteness and finality to constitute it a Pennsylvania rule of action and conduct, binding on the federal courts. Indeed, the *Falchetti* case, together with the associated Pennsylvania cases heretofore cited, would seem to us to have established the Pennsylvania rule with a degree of definiteness and finality which might fairly be called absolute. Even a single decision, if "clear and unequivocal", and constituting a "definitive holding", should be recognized as controlling (*Hawks* v. *Hamill*, 288 U. S. 52).

(2) *The Pennsylvania rule is sufficiently local in nature to be controlling, even if more definiteness and finality of establishment might be required in a rule of a more general nature.*

As heretofore contended, we think the cited Pennsylvania decisions have established the Pennsylvania rule as to longitudinal pathways with such definiteness and finality that the rule would control even if it could be described as general in nature.

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[2] See *Northwestern Life Ins. Co.* v. *Johnson*, 254 U. S. 96, involving the validity of an incontestibility clause where the insured committed suicide, this Court stating that "The public policy with regard to such contracts is a matter for the States to decide" (p. 100).

jury, not because fairminded men might differ as to the existence of negligence, but because other courts (in cases deemed to be similar) have thought that fairminded men might differ as to the existence of negligence.

We think a reading of the opinion renders it clear that this criticism is more than a verbal one. The inevitable effect of the rule applied by the Circuit Court of Appeals is that the cases which are most extreme in holding that fairminded men might differ, *ipso facto* establish the criterion for all other courts. If the court is to yield its own judgment to that of other courts, there is no more reason for yielding to the courts which have been most extreme in holding negligence to be a question of fact than there would be for yielding to the courts which have been most extreme in holding negligence to be a question of law. If there is any blind presumption in the matter, it is in favor of the courts that have taken a position between the two extremes.

The vice of the rule applied by the Circuit Court of Appeals is indicated by the cases cited as involving "closely similar circumstances". In none of them was there any such deliberate flirting with danger as that exhibited by the plaintiff in this case.[1]

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[1] In *Schultz* v. *Erie R. Co.*, 46 Fed. (2d) 285, the plaintiff was five feet from the track at a public crossing. In *Pruitt* v. *Southern Ry. Co.*, 167 N. C. 246, 83 S. E. 350, the plaintiff was four to five feet from the track at a public crossing. In *Missouri K. & T. Ry. Co.* v. *Scarborough*, 29 Tex. Civ. App. 194, 68 S. W. 196, a child was on a private loading skidway, about four feet from the edge which, in turn, was six inches to two feet from the cars. In *St. Louis, S. W. Ry. Co.* v. *Wilcox*, 57 Tex. Civ. App. 3, 121 S. W. 588, the plaintiff was on a station platform, five feet from the train. In *Texas & P. Ry. Co.* v. *Green*, 291 S. W. 929, affirmed by Tex. Com. App. 299 S. W. 639, the plaintiff was at a street grade crossing when the sudden stopping of the train caused a door to swing open and hit him. In *Chesapeake & O. Ry. Co.* v. *Davis*, 22 Ky. Law Rep. 748, 58 S. W. 698, the plaintiff was two and a half to three feet from the train at a public crossing in a populous place. In *Sullivan* v. *Vicksburg S. & P. R. Co.*, 39 La. Ann. 800, 2 So. 586, the plaintiff was in the middle of a walk constructed by the railroad for passengers. In *Munroe* v. *Pennsylvania R. Co.*, 85 N. J. L. 688, 90 A. 254, the plaintiff was three feet from the edge of a station platform. In none of the cases was it dark.

The single case cited by the Circuit Court of Appeals in which the plaintiff was found to be contributorily negligent as matter of law was a case decided by the same Court, namely, *Delaware & H. R. Co.* v. *Wilkins*, 153 F. 845. The case was distinguished as inapposite because the plaintiff was there struck by a fixed structural part of a train whereas the jury was permitted to find that the present plaintiff was struck by a negligently permitted projection. Of course, the existence or non-existence of negligence on the railroad's part does not determine the issue as to the plaintiff's contributory negligence.

It is respectfully urged that the cases cited by the Circuit Court of Appeals, in conjunction with the rule applied by the Court in disregard of its own judgment, show beyond question that the defendant has been denied the benefit of a proper judicial determination upon the question of plaintiff's contributory negligence. It would seem to us to be of general importance that the novel test applied by the Circuit Court of Appeals with respect to contributory negligence should not be permitted to stand.

CONCLUSION.

It is respectfully submitted that this case involves matters which should be reviewed by this Court, and that a writ of certiorari should be granted for that purpose.

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It is manifest, however, that the Pennsylvania rule is, in a large measure, local in its nature. It rests expressly on a local policy relating to the efficient operation of railroads, a policy which presumably was dictated by local conditions.

This Court has repeatedly indicated that the nature of a contested rule, whether general or local, is a question of degree, and that the requirements as to definiteness and finality of establishment are less exacting accordingly as the rule is more local in nature.

Thus, on the construction of a local statute relating to local matters, the federal courts are disposed to follow even local administrative interpretations when local decisions are lacking (*Fox* v. *Standard Oil Co.*, 294 U. S. 87), or they will await a state court decision when practicable (*Thompson* v. *Consolidated Gas Utilities Corp.*, 300 U. S. 55, 74).

As to state rules of property, which constitute a classic example of "local law", it is of course true that there must be some degree of establishment to render them controlling (*Gibson* v. *Lyon*, 115 U. S. 439; *Lane* v. *Vick*, 3 How. 464); but innumerable cases in this Court demonstrate that the requirements as to establishment are much less exacting than in matters of a more general nature or concern. Thus, the federal courts may yield to a pertinent state decision even though doubtful of the establishment of the rule involved (*Hulburd* v. *Commissioner*, 296 U. S. 300); and, if the rule is definitely established, will not concern themselves with the logic of its derivation even when expressly contrary to holdings of the Supreme Court (*United States* v. *Robbins*, 269 U. S. 315).

That the local nature of a contested rule is a question of degree was clearly indicated in the recent case of *Mutual Life Ins. Co.* v. *Johnson*, 293 U. S. 335. On the construction of an insurance policy, determinable by the law of Virginia, this Court yielded to a Virginia case with the comment (pp. 339-340):

> "At least in cases of uncertainty we steer away from a collision between courts of state and nation when har-

> money can be attained without the sacrifice of ends of national importance * * *. With choice so 'balanced with doubt', we accept as our guide the law declared by the state where the contract had its being."

A question otherwise general in nature may be treated as local when affected by a local policy, as Mr. Justice Story intimated in *Carpenter* v. *Providence Washington Ins Co.*, 16 Pet. 495, and as this Court stated in *Northwestern Life Ins. Co.* v. *Johnson*, 254 U. S. 96, 100.

The Pennsylvania rule as to longitudinal pathways clearly lacks the features of a general nature which were emphasized in the only case in this Court cited by the Circuit Court of Appeals, namely, *B. & O. Rd. Co.* v. *Baugh*, 149 U. S. 368, *supra*. On a question of assumption of risk under the fellow servant doctrine, raised by an injury to a fireman caused by the engineer's negligence while the train was in Ohio, this Court noted that the Ohio decisions invoked by the plaintiff decided the question "as one of common or general law" and not "upon anything of a local nature" (pp. 376-7). In reaching a contrary conclusion on the question, this Court said (p. 378):

> "* * * it is a question in which the nation as a whole is interested. It enters into the commerce of the country * * *. The lines of this very plaintiff in error extend into half a dozen or more States, and its trains are largely employed in interstate commerce. As it passes from State to State, must the rights, obligations and duties subsisting between it and its employees change at every state line?"

The present question relating to longitudinal pathways is much more closely analagous to that raised in *Detroit* v. *Osborne*, 135 U. S. 492 (distinguished in the *Baltimore & Ohio* case at pages 373-4). On the question of the liability of a municipal corporation for negligence in failing to keep a sidewalk in repair, this Court said, in recognizing the Michigan decisions as controlling (p. 498):

> "Whatever our views may be as to the reasoning or conclusion of that court, is immaterial * * *. There should be, in all matters of a local nature, but one law within the State; and that law is not what this court might determine, but what the Supreme Court of the State has determined. A citizen of another State going into Michigan * * * walks the streets and highways in that State, entitled to the same rights and protection, but none other, than those accorded by its laws to its own citizens."

The Pennsylvania rule refusing to recognize permissive rights with respect to pathways along the rights of way of railroads is essentially local because it is based on a state policy derived from local conditions and because it applies solely to pathways in Pennsylvania. Is it conceivable that the federal courts may deny to the Pennsylvania courts the power effectively to establish such a rule of conduct within the borders of the State?

However strongly the argument for "uniformity" may favor the independence of the federal courts in matters of such a general nature as that involved in the *Baltimore & Ohio* case, it operates with at least equal force in favor of adherence to state decisions in matters of such a local nature as those involved in the Detroit case and the present case. Since the Pennsylvania courts are under no obligation to yield to the federal courts, and presumably would consider that they could not do so under the doctrine of *stare decisis*, the prospect under the present decision of the Circuit Court of Appeals is that railroads in Pennsylvania will owe—or rather will have owed—one duty to residents who sue in the state courts and another to those who are able to capitalize on a diversity of citizenship.[1] The Circuit Court of Appeals is not here exercising the legitimate function of preventing state favoritism as between citizens of different states; it is itself creating a discrimination.

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[1] The present plaintiff, a citizen and resident of Pennsylvania, could have sued the defendant in the Pennsylvania state courts (fols. 11-12, 29; Purdon's Penn. Statutes, Title 67, §§ 491-2).

D. The decision of the Circuit Court of Appeals is in conflict with the decisions of other circuit courts of appeals on essentially this same matter.

Aside from *Baltimore & Ohio Rd. Co.* v. *Baugh*, 149 U. S. 368, *supra*, the Circuit Court of Appeals cited, in support of its rejection of the Pennsylvania decisions, only two cases: *Cole* v. *Pennsylvania R. Co.*, 43 Fed. (2d) 953 (CCA-2-1930), and *Redfield* v. *New York Central R. Co.*, 83 Fed. (2d) 62 (CCA-8-1936). The *Cole* case rejected the New York rule that a railroad is not liable for the spread of fire to non-abutting land, and applied a contrary rule on the theory that the question was one of general jurisprudence. The *Redfield* case, in rejecting an asserted Ohio rule as to presumed negligence, adopted a contrary rule on the stated theory that "The common law is, as to federal courts, the same in all states" (p. 65).

That a conflicting view is held by other Circuit Courts of Appeals is attested by many cases.

In *Boston & Maine Rd. Co.* v. *Breslin*, 80 Fed. (2d) 749 (CCA-1-1935), cert. den. 297 U. S. 715, the court followed the Massachusetts rule which rejected the attractive nuisance doctrine in turntable cases, and held the railroad only to the obligation to refrain from wilful or wanton injury to a child as a trespasser. The Court distinguished the *Baltimore & Ohio* case (149 U. S. 368, *supra*) and similar cases as resting on very different considerations.

In *Marous* v. *Forcier*, 38 Fed. (2d) 8 (CCA-1-1930), the Court followed the Maine rule that an automobile driver's negligence can not be imputed to a guest.

In *United Shoe Machinery Corp.* v. *Paine*, 26 Fed. (2d) 594 (CCA-1-1928), the Court followed the New Hampshire rule as to the standard of care required of a landlord with respect to an unleased entrance way.

In *Milford & U. St. Ry. Co.* v. *Cline*, 150 Fed. 325 (CCA-1-1907), the Court followed a Massachusetts rule as to negligence in approaching a street railway, deeming the question, since it concerned the use of highways, to be a local one as

distinguished from the question of a railroad's general responsibility to employees.

In *Delaware and Hudson Co.* v. *Nahas*, 14 Fed. (2d) 56 (CCA-3-1926), the court followed the New York rule as to the standard of care required of a person approaching a railroad crossing.

In *Roberts* v. *Tennessee Coal etc. Co.*, 255 Fed. 469 (CCA-5-1918), the court followed an Alabama "rule of conduct" that an employee's forgetfulness of a dangerous wire was contributory negligence.

In *Gibson Coal & Coke Co.* v. *Allen*, 280 Fed. 28, 37 (CCA-6-1922), the court followed a Kentucky rule as to *bona fide* purchasers on the strength of a Kentucky decision deemed "dispositive" of the question in that State.

In *Ballard* v. *Ocean Accident & Guarantee Co.*, 86 Fed. (2d) 449 (CCA-7-1936), the court followed the Wisconsin rule on the question whether an insurance company was under an obligation of due care or only of good faith in the handling of a suit for injuries in an automobile accident.

In *McGuire* v. *Sherwin-Williams Co.*, 87 Fed. (2d) 112 (CCA-7-1936), the court followed the Illinois rule as to the standard of care required of an employer with reference to occupational diseases.

In *Huffman* v. *Baldwin*, 82 Fed. (2d) 5 (CCA-8-1936), cert. den. 299 U. S. 550, the court followed the Arkansas rule with respect to an engineer's joint liability with that of the railroad in a crossing accident.

In *Kowalski* v. *Chicago G. W. R. Co.*, 84 Fed. 586, aff'd. 92 Fed. 310 (CCA-8-1899), the court followed the Iowa rule as to imputing a parent's negligence to a child in a crossing accident.

The foregoing cases include the First, Third, Fifth, Sixth, Seventh and Eighth Circuits. It may be noted that the Circuit Court of Appeals for the Second Circuit has itself apparently held a different view. In *New York S. & W. R. Co.* v. *Thierer*, 209 Fed. 316 (CCA-2-1913), the court followed the New Jersey rule as to negligence in approaching a rail-

road crossing, as declared by the highest court of that State. To the same effect is *Boston & Maine R. R.* v. *Daniel*, 290 Fed. 916, 922 (CCA-2-1923).

Point II. The Courts below erred in refusing to hold plaintiff contributorily negligent as matter of law; and, in particular, the Circuit Court of Appeals erred in applying an unsound test as to whether the question was for the jury.

As shown in the statement of facts in the Petition, *supra*, the plaintiff, according to his own testimony, was deliberately and unnecessarily walking alongside the track in complete darkness with his right side within possibly a foot of the moving train when he was struck by some projection which, on the trial if not in his sworn bill of discovery, he thought looked like a car door.

The Circuit Court of Appeals regarded plaintiff's conduct as "imprudent" but nevertheless regarded the question as one for the jury for the stated reason that the allowance of recoveries in other cases, deemed to be similar, indicated that fairminded men might differ from them; and this conclusion purported to be pursuant to the rule of *Richmond & Danville Rd. Co.* v. *Powers*, 149 U. S. 43, 45, and *Texas & Pac. Ry. Co.* v. *Harvey*, 228 U. S. 319.

The familiar rule, as stated in the latter case, is as follows (p. 324):

> "Where there is uncertainty as to the existence of negligence or contributory negligence, whether such uncertainty arises from a conflict of testimony or because, the facts being undisputed, fairminded men might honestly draw different conclusions therefrom, the question is not one of law."

It would seem obvious that the Circuit Court of Appeals did not apply this rule. It held the question to be for the

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IN THE

Supreme Court of the United States

OCTOBER TERM—1937.

ERIE RAILROAD COMPANY (a New York corporation), Petitioner, against HARRY J. TOMPKINS, Respondent.	No. 367.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

BRIEF ON BEHALF OF PETITIONER ERIE RAILROAD COMPANY.

Opinions Below.

No opinion was rendered by the United States District Court for the Southern District of New York, before which court the case was tried (p. 383).

The opinion of the Circuit Court of Appeals for the Second Circuit appears in the record at pages 393-398. It is reported in 90 Fed. (2d) at page 603.

Jurisdiction.

Certiorari to review the judgment of the Circuit Court of Appeals entered herein on June 14, 1937 (pp. 398-9) was granted by this Court on October 11, 1937, upon a petition therefor filed on August 30, 1937 and based upon Section

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Petitioner,

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WILLIAM C. CANNON,
THEODORE KIENDL,
HAROLD W. BISSELL,
Counsel for Petitioner.

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240(a) of the Judicial Code as amended by the Act of February 13, 1925, Ch. 229, sec. 1; 43 Stat. 938; 28 U. S. C. A., sec. 347(a).

The Questions Presented.

The action is based on alleged injuries suffered by the plaintiff-respondent on the defendant-petitioner's right of way in Pennsylvania while on a pathway extending alongside defendant's track. As heretofore stated in the petition for writ of certiorari, two questions are presented to this Court.

The first question is whether the defendant's duty toward the plaintiff should have been determined in accordance with Pennsylvania law. Under Pennsylvania law as declared by the highest court of the state, the doctrine of permissive pathways, although applicable to crossings (with the consequence that persons using them are deemed to be licensees to whom the railroad owes a duty of reasonable care), does not apply to pathways along the right of way and hence persons using such pathways are deemed to be trespassers to whom the railroad is under no obligation except to refrain from wilful or wanton negligence. The courts below refused to apply the Pennsylvania law, despite the fact that this was a longitudinal pathway accident as distinguished from a crossing accident, or, at all events, despite the fact that the jury could have so found. The petitioning railroad contends that the courts below should have applied the Pennsylvania rule either on principles of comity or by virtue of the Rules of Decision Act (Act of September 24, 1789, c. 20, sec. 34, 1 Stat. 92, as revised; Rev. Stat., sec. 721; 28 U. S. C. A., sec. 725), which provides:

> "The laws of the several States, except where the Constitution, treaties, or statutes of the United States otherwise require or provide, shall be regarded as rules of decision in trials at common law, in the courts of the United States, in cases where they apply."

The second question presented is whether the courts below were correct in refusing to hold the plaintiff guilty of contributory negligence as matter of law; and, in particular, whether the Circuit Court of Appeals was correct in holding that, despite its own expressed view that the plaintiff was imprudent, the issue was for the jury because "the fact that recoveries have been allowed under closely similar circumstances * * * indicates that fair-minded men may hold a different view" (pp. 396-7).

The substantial nature of these questions was considered in the petition for certiorari, to which we respectfully refer. We assume that the conflict of opinion among the Circuit Courts of Appeals and like reasons for the granting of certiorari do not require restatement in this brief.

Statement of the Case.

The suit was instituted in the United States District Court for the Southern District of New York to recover $100,000 damages for personal injuries sustained by the plaintiff-respondent while walking on the defendant-petitioner's right of way at Hughestown, Pennsylvania, on July 27, 1934 (pp. 2-5). Plaintiff's testimony was that he was struck by a projection from the defendant's train and thrown under the train, sustaining injuries resulting in the amputation of his right arm. The jury brought in a verdict for $30,000 damages (pp. 351-2), upon which the District Court rendered a judgment for the plaintiff dated November 16, 1936, in the sum of $30,260 (pp. 382-3). Upon appeal by this petitioner (pp. 384-391), the Circuit Court of Appeals affirmed the judgment of the District Court (pp. 398-9).

On the night of the accident, according to the plaintiff's testimony, he started for his home after visiting his sick mother-in-law until about 12:30 a. m. At about 2:30 a. m. he arrived at the Rock Street grade crossing in Hughestown in an automobile, in the company of two other men. At this point he left the automobile, intending to reach his home in

Hughes Street by walking northeasterly on defendant's right of way for some 130 feet, then turning off the right of way into the blind end of Hughes Street, which extends northwesterly from the boundary line of the right of way (pp. 19, 27-30, 41-2, 57-9).

Looking northeasterly along the right of way from the Rock Street grade crossing, a longitudinal pathway extends along the left side of the track, just outside the ties, for a distance of about 115 feet, where it meets a diagonal pathway leading to the left, away from the track at an obtuse angle, off the right of way and into the blind end of Hughes Street. As will be noted more particularly hereafter, an extension of this diagonal pathway to the right, although having nothing to do with the plaintiff's actual or intended route into Hughes Street, crosses the track and the remainder of the right of way into an adjoining field at the right.[1]

After leaving the Rock Street grade crossing and entering on the longitudinal pathway, plaintiff testified, he heard a train whistle ahead of him, heard the noise of the train and saw the headlight on the engine as it approached him, but deliberately continued walking on the pathway until he was struck (pp. 45-9, 63, 30). This testimony, it may be noted, contradicted plaintiff's complaint which alleged there was no signal and that he was unaware of the approach of the train (p. 3).

Except for the momentary light from the headlight, which vanished after the engine passed him, the plaintiff conceded that the pathway was wholly unilluminated and that it was a very dark night (pp. 41-2, 149; and see plaintiff's bill of discovery, pp. 7-9).

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[1] See pp. 19-27, 92, 34, 60. The area is photographed looking northeasterly (Pltf.'s Ex. 2, p. 354; Pltf.'s Ex. 6, p. 358; Deft.'s Exs. A, B and D taken from a little distance, pp. 360, 361, 368-373; Deft.'s Ex. C taken closer, pp. 362-3) and looking southwesterly (Pltf.'s Ex. 3, p. 355; Pltf.'s Ex. 5, p. 357); and is also shown by a blueprint (Pltf.'s Ex. 1, p. 353). The Rock Street grade crossing may be identified by the striped crossing sign which appears in all of the photographs except Plaintiff's Exhibit 6. The longitudinal pathway is on the same side of the track as the crossing sign.

This longitudinal pathway on which the plaintiff was walking was about two feet wide (pp. 21, 42, 166). Plaintiff's witnesses differed somewhat in describing the proximity of the pathway to the end of the ties, the plaintiff stating the distance as about two feet (pp. 21-2, 42) while others placed the pathway right up against the ties (pp. 34, 88-9, 108, 112, 120-1, 128-9, 138, 163-6). These differences, however, are unimportant in the light of the undisputed fact that fixed structural parts of the train extended as much as one foot and five inches beyond the ties (pp. 216-221, 139, 150). Furthermore, plaintiff conceded that he knew that the train extended beyond the ties and conceded further that his right side was possibly within a foot of the side of the train (pp. 42-4). To avoid being hit, plaintiff knew that he had to walk on the outer edge of the two-foot pathway (pp. 41, 90-1, 99, 100-1, 150-1). In his bill of particulars, plaintiff charged defendant with negligence in permitting the pathway "to be located so close to its tracks as to be dangerous to life and limb" (p. 15). The plaintiff's long familiarity with the pathway and its surroundings was conceded (pp. 20, 35, 38, 41). The train was moving at a rate of eight to ten miles an hour according to defendant's witnesses (pp. 288, 315, 326-7, 334, 335, 339), about 30 to 35 miles an hour according to plaintiff (pp. 44-6).

As bearing further on the question of plaintiff's negligence, it should be noted that he could readily have avoided all danger. In the first place, he could have reached his home, without inconvenience, by the regular public thoroughfares (pp. 27, 59-61). In the second place, having chosen to use the pathway along the track, he could readily have stepped aside to a position of safety (pp. 38-41, 20-1, 34, 101, 137-9; Pltf.'s Exs. 2, 3, 5, 6, at pp. 354, 355, 357, 358; Deft.'s Exs. A to D at pp. 360-373), any contrary contention being "patently absurd", as stated by the Circuit Court of Appeals (p. 396).

The plaintiff testified that, after the engine had passed him and while he was continuing on the pathway with no

light at all (pp. 41-2), he was hit by "a black object that looked like a door to me" and had the dimensions of a door (pp. 30, 51, 65-6). This trial version, it may be noted, contradicted the plaintiff's prior sworn statement in his bill of discovery (instituted to obtain information for a bill of particulars herein) that the projection could not be seen in the darkness and that he was "unable to state" and "does not know what object the defendant permitted to project from the said train, much less the dimensions, its nature and its location on the train" (pp. 8, 9-10). This bill of discovery version, if reaffirmed on the trial, would have barred a recovery (*McCarthy* v. *New York, New Haven & Hartford Rd. Co.*, 240 Fed. 602, C. C. A. 2-1917); but on the trial plaintiff disposed of it by the simple expedient of testifying that, in this as in other respects, his bill of discovery, which he had read and verified, was false (pp. 52-4 and see pp. 45, 47-9, 56, 61, 63-4).

Since the Pennsylvania law refuses to recognize permissive rights on longitudinal pathways as distinguished from crossings and imposes upon the railroad no duty to persons thereon except the duty to refrain from wilful or wanton negligence, it becomes important to note that there was no evidence of wilful or wanton negligence on defendant's part. The only evidence of negligence on defendant's part consisted in plaintiff's vague testimony of being struck by a projection which looked like a door to him (pp. 30, 65-6). The lengthy examination and cross-examination of employees of defendant (pp. 179-215, 225-268, 280-339) produced no evidence of negligence in inspection, no evidence that the defendant knew of any loose door if there was one; and it affirmatively appeared without dispute that the plaintiff was not seen and that no employee or representative of the defendant knew of the accident until some time after its occurrence (pp. 329-330, 334-5, 336, 339). Indeed, it is doubtful, to say the least, whether any question of negligence on defendant's part should have gone to the jury, irrespective of the Pennsyl-

vania law;[1] but, in any case, there was no evidence of the wilful or wanton negligence essential under the Pennsylvania law in order to render the railroad liable.

With further reference to the Pennsylvania law, it is necessary to note the facts bearing on plaintiff's belated effort to escape the effect of that law as applying to longitudinal pathways. This effort consisted in an attempt to picture the accident as a crossing accident rather than a longitudinal pathway accident. Although conceding that he was still walking on the longitudinal pathway when the engine and several cars passed him and when he was struck, he testified that he arrived at the precise point of intersection of the longitudinal and diagonal pathways at the precise instant of impact.

Aside from the fact that the plaintiff's arrival at the diagonal pathway is disputed (as will presently be noted), the facts clearly indicate that, even if plaintiff's testimony be given the fullest effect, the accident is still to be characterized as a longitudinal pathway accident rather than a crossing accident. As shown by the testimony and exhibits already cited, a person using the pathways in going from the Rock Street grade crossing to the blind end of Hughes Street would walk along the longitudinal pathway at the left of the track until he reached the diagonal pathway and would then veer to the left, away from the track, on the diagonal pathway, and pass off the right of way into the blind end of Hughes Street. The part of the diagonal pathway to the right of the longitudinal pathway, after crossing the track and the rest of the right of way, continued diagonally across a field and over a hill, running into Rock Street at a point some distance southeast of the Rock Street grade crossing (pp. 20, 22-3, 24-7, 34-5, 69-70, 85, 92-4, 107-8, 117, 154, 157;

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[1] Not only was plaintiff's testimony as to a projecting door too vague to be credited, but, even if credited, the mere fact of a loose door would be insufficient to put the rule of *res ipsa loquitur* into operation (*Musto v. Lehigh Valley R. R.*, 192 A. 888, Penn. Supreme Court, June 25, 1937; *Texas & N. O. R. Co. v. Smith*, 285 S. W. 918, Tex. Civ. App.).

Pltf.'s Ex. 1, p. 353). Obviously, a person walking from the Rock Street grade crossing on the longitudinal pathway would not turn to the right on the diagonal pathway, since the latter would merely carry him back to Rock Street. The portion of the diagonal pathway which crossed the track would be used only by persons coming from the blind end of Hughes Street and desiring to strike Rock Street some distance to the southeast of the Rock Street grade crossing. Assuming that the defendant had given a permissive right to use this winding diagonal pathway as a crossing and hence should have exercised due care in watching for anyone approaching the track from either side of the right of way, the plaintiff's own testimony is that, as the train approached and as the engine passed him, he was still walking exclusively on the longitudinal pathway some distance short of the diagonal pathway.

In any case, as above intimated, the plaintiff's asserted arrival on the diagonal pathway, if at all credible and if relevant, was disputed. It may be noted that the complaint described the accident as occurring exclusively on the longitudinal pathway (p. 3); that the plaintiff's verified bill of discovery described the accident as occurring on the "parallel" pathway (p. 8); that plaintiff's bill of particulars claimed that the accident occurred on the longitudinal pathway "about 60 feet" from the Rock Street crossing (p. 15) which would be some 55 feet short of the diagonal pathway (see p. 4, including footnote 1, *supra*), and that the defendant's negligence was in respect of the longitudinal pathway (p. 15).

It was not until the plaintiff took the stand that he moved the accident out along the longitudinal pathway to the precise point where it ran into the diagonal pathway. He testified that, after leaving the Rock Street grade crossing by way of the longitudinal pathway, he was "about half ways over the block" from Rock Street to Hughes Street when he heard the whistle and saw the headlight of defendant's approaching train "about a hundred or a hundred and fifty

feet" ahead of him (pp. 30, 48-9), that he "kept right on walking" on the longitudinal path, that he "got to almost where the paths joined, all but a few steps" when the engine passed him, and that he had "got right on the [diagonal] path" when he was hit (pp. 30, 71). But on further examination, his testimony was that he was "on the verge" of turning onto the diagonal path, that his "next step was to be" down the diagonal path (p. 72), but that he "had not started turning into the diagonal path" (p. 79). Plaintiff's witnesses Colwell and McHale testified that they found the plaintiff lying six to ten feet short of the diagonal path (pp. 87, 115); but on cross examination McHale could not deny that the plaintiff's body might have been 75 feet nearer to Rock Street or that he had so indicated to a representative of the defendant named Dineen (pp. 116-7).

Specification of Errors to Be Urged.

1. The Circuit Court of Appeals erred in refusing to apply the established law of Pennsylvania which denies permissive rights on longitudinal pathways along the right of way as distinguished from crossings over the right of way, and holds the railroad liable only for wilful or wanton negligence toward persons using such longitudinal pathways (see C. C. A. opinion, pp. 394-5).

This question was presented below (Deft.'s objection, p. 25; Deft.'s motions, pp. 178, 339-340, 352, 381-2; Deft.'s request to charge No. 1, pp. 342, 349; court's charge re license and trespass, pp. 345, 346-7; Deft.'s exception thereto, p. 351; assignment of errors Nos. 1-5, 10, 15, pp. 385-6, 388, 390).

It is urged that error was committed in this regard even if there was a disputed question of fact whether plaintiff had arrived at the junction of the longitudinal path and the crosspath inasmuch as the charge did not submit the question to the jury and imposed upon the railroad the duty of due care whatever the jury might find on this disputed question.

2. The Circuit Court of Appeals erred in refusing to hold the plaintiff guilty of contributory negligence as matter of law; and, in particular, erred in applying an unsound and prejudicial rule to determine whether the question of contributory negligence was one of fact or of law, the rule being stated in the following words (pp. 396-7):

> "To us it would seem imprudent to walk, or even to stand, in the dark within a foot of a train moving at the rate of 10 miles an hour; but the fact that recoveries have been allowed under closely similar circumstances in the cases above cited indicates that fair-minded men may hold a different view. This is enough to preclude taking the issue from the jury."

The question was presented below (Deft.'s motions, pp. 178, 339-340, 352, 381-2; Deft.'s requests to charge Nos. 6, 9, 10, pp. 343, 350; court's charge, pp. 346, 347; assignment of errors Nos. 1-4, 9, 16-18, pp. 385-6, 388, 390-1).

Summary of Argument.

Point I. Assuming that Pennsylvania law denies permissive rights on longitudinal pathways as distinguished from crossings and assuming that this Pennsylvania law controls, the courts below have committed reversible error (p. 12).

> A. Error was committed since the evidence conclusively characterizes the accident as a longitudinal pathway accident as distinguished from a crossing accident (p. 12).
>
> B. Error was committed in any event since the jury should at least have been permitted to find that the plaintiff was exclusively on the longitudinal pathway when struck (p. 13).

Point II. The law of Pennsylvania, as established by the highest court of the state prior to this accident, repudiates permissive rights on pathways along a railroad's right of way as distinguished from crossings (p. 15).

Point III. The courts below erred in refusing to recognize the Pennsylvania decisions denying permissive rights on longitudinal pathways as distinguished from crossings (p. 23).

A. The Pennsylvania decisions denying permissive rights on longitudinal pathways as distinguished from crossings should have received due consideration in recognition of the elementary principle that the law to be applied is the *lex loci delicti* (p. 25).

B. The Pennsylvania decisions denying permissive rights on longitudinal pathways as distinguished from crossings should have been recognized as controlling because they had established the rule of law with sufficient definiteness and finality to constitute it a local rule of property, action or conduct, even though the question might otherwise have been regarded as mainly one of general law (p. 27).

C. The Pennsylvania decisions denying permissive rights on longitudinal pathways as distinguished from crossings declare a Pennsylvania rule sufficiently local in nature to be controlling, even though more definiteness and finality might be required in a rule of a more general nature (p. 38).

Point IV. The courts below erred in refusing to hold plaintiff contributorily negligent as matter of law; and, in particular, the Circuit Court of Appeals erred in applying an unsound test as to whether the question was for the jury (p. 46).

Conclusion (p. 49).

ARGUMENT.

POINT I.

Assuming that Pennsylvania law denies permissive rights on longitudinal pathways as distinguished from crossings and assuming that this Pennsylvania law controls, the Courts below have committed reversible error.

For the purposes of the present Point we assume that Pennsylvania law denies permissive rights on longitudinal pathways as distinguished from crossings, with the consequence that persons using such longitudinal pathways are trespassers to whom the railroad owes no obligation except to refrain from wanton or wilful injury while persons using crossings are licensees to whom the railroad owes an obligation of due care (argued in Point II); and we further assume that the Pennsylvania law in this respect should have been applied in this case (argued in Point III). It is not disputed that the accident occurred in Pennsylvania.

A. Error Was Committed Since the Evidence Conclusively Characterizes the Accident as a Longitudinal Pathway Accident as Distinguished from a Crossing Accident.

In an insubstantial attempt to characterize the accident as a crossing accident, the plaintiff testified as heretofore noted that in walking along the longitudinal pathway he had arrived at the precise point where the longitudinal pathway meets the diagonal crosspath when he was struck.

Even if this testimony were undisputed it would not characterize the accident as a crossing accident and thus impose upon the railroad an obligation of due care. Assuming that the diagonal pathway was a permissive crossing, the per-

mission was to use the pathway as a crossing, and the correlative duty of the railroad was to exercise due care toward persons so using the pathway. In the exercise of due care it would be incumbent upon the railroad to anticipate that licensees might be approaching the track, by way of the crosspath, from either side of the right of way; but it would be wholly without relation to the granted permission and highly unreasonable to require the railroad to anticipate that a trespasser, springing from a forbidden spot, might suddenly appear in the middle of the crosspath—not to mention the fact that the present plaintiff's sudden appearance did not occur until the engine had passed the crosspath. Under no reasonable construction of the permissive crossing doctrine can such a person be regarded as availing himself of the permitted usage.

In its charge, the trial court treated the accident as a longitudinal pathway accident, manifestly ignoring the plaintiff's asserted arrival at the diagonal pathway as without any significance (p. 345); and in this treatment of the facts we think the trial court was fully justified. But, under the assumptions of law made for the purposes of the present Point, the trial court erred in permitting the jury to find that the longitudinal pathway was a permissive way and in imposing an obligation of due care upon the railroad in the event of such a finding (pp. 345-6, 347). The Circuit Court of Appeals likewise erred in sustaining this charge (pp. 394-5).

B. Error Was Committed in Any Event Since the Jury Should at Least Have Been Permitted to Find That the Plaintiff Was Exclusively on the Longitudinal Pathway When Struck.

Even if a bare contact with the diagonal pathway, no matter how achieved, could be deemed sufficient to inaugurate a duty of due care on the part of the railroad, the plaintiff's asserted arrival at the pathway was disputed (Statement

of the Case, *supra*, pp. 8-9). Under the applicable Pennsylvania law as assumed in the present Point, this dispute presented at least a question of fact which should have been submitted to the jury, and the jury should have been instructed to bring in a verdict for the defendant in case they found that the plaintiff was struck before he reached the diagonal pathway. The trial court left no such question to the jury. Indeed, as just noted, the trial court treated the accident exclusively as a longitudinal pathway accident and nevertheless permitted the jury to find, contrary to Pennsylvania law, that the railroad had given permissive rights thereon (charge, pp. 345-6). This charge was necessarily sustained by the Circuit Court of Appeals in affirming the judgment (see pp. 394-5). In opposing certiorari, plaintiff's counsel, citing the statement of the Circuit Court of Appeals that the plaintiff was struck "just as he got to the intersection" of the two paths (p. 394), asserted that the Circuit Court of Appeals "affirmed the fact" that the plaintiff was at the junction of the two paths, that at best this was a disputed question of fact, and that this Court will not concern itself with disputed questions of fact (Brief opposing certiorari, pp. 22-3). The context of the opinion, however, renders it quite clear that the Circuit Court of Appeals was not purporting to rule, as a matter of fact or of law, that the plaintiff had reached the diagonal pathway. On the contrary, the determinative part of the opinion followed the trial court in treating the accident as a longitudinal pathway accident (pp. 394-5). It is perhaps needless to add that we are not asking this Court to determine a disputed question of fact. The point of course is that, if there was a disputed question of fact on a material issue, the question should have been submitted to the jury.

Thus, the decisions below have gone against the defendant on the assumption, correct in point of fact, that the accident occurred while the plaintiff was walking on a longitudinal pathway as distinguished from a crossing. Under the applicable Pennsylvania law, the fact so assumed necessarily renders the decisions erroneous.

POINT II.

The law of Pennsylvania, as established by the highest court of the state prior to this accident, repudiates permissive rights on pathways along a railroad's right of way as distinguished from crossings.

Before considering the extent to which the Pennsylvania decisions should influence the federal courts, we here set forth an analysis of those decisions. Since the accident in suit occurred in July 1934 (pp. 15, 33, 38, 57, 344), it will be observed that the Pennsylvania decisions related to the Pennsylvania law as established prior to the accident.

In *Falchetti* v. *Pennsylvania R. Co.*, 307 Pa. 203, 160 Atl. 859 (1932), a case of injury to a child walking on an alleged permissive pathway on a railroad's right of way, alongside the track, the court said that "an alleged permissive way parallel with plaintiff's tracks and on its right of way, as distinguished from a permissive crossing over them, is not recognized in this State." Referring to the cases cited to it as contrary, the court said further: "So far, if at all, as they tend to sustain the right to continue such a use, they must be considered as overruled by the *Conn* and *Kolich* cases."

The plaintiff has heretofore attacked this unequivocal declaration of the Pennsylvania law as to longitudinal pathways by citing prior cases asserted to be inconsistent with the *Falchetti* case, by endeavoring to distinguish prior cases cited by appellant and by the Pennsylvania Supreme Court in support of the *Falchetti* doctrine, and by endeavoring to distinguish subsequent cases approving the *Falchetti* case. We shall briefly discuss these cases in their chronological order.

Kay v. *Pennsylvania Rd. Co.*, 65 Pa. 269, 3 Am. Rep. 628 (1870). Plaintiff has cited this case as sustaining permissive rights on a longitudinal pathway, quoting the state-

ment that "along the tracks where the accident happened a well-worn footpath was plainly visible." That this case is an authority for defendant rather than for plaintiff is shown by the fact that the site of the accident was a large open lot, traversed by sidings, used for the storage of lumber and open to the public in connection therewith. In holding that there was proper evidence of permissive use, the court said, "it is not like those portions of the road used solely for the passage of trains, where the company would have not only the right to demand, but reason to expect a clear track."

Taylor v. *Del. & H. Canal Co.*, 113 Pa. 162, 8 Atl. 43 (1886). In his brief opposing certiorari, the plaintiff cited this case as upholding permissive rights on longitudinal pathways as distinguished from crossings, and purported to give two quotations from the opinion (Br., p. 18). The first quotation is from the opinion of the lower court (Court of Common Pleas) the determination of which court was reversed. The second quotation is from a summary of the argument of one of the parties to the appeal. While this would seem to be sufficient to dispose of the purported quotations, it is interesting as well as pertinent to note that the opinion of the Court of Common Pleas sustained the trial court's nonsuit of the plaintiff on the ground that the evidence showed the pathway in question was used to go along the right of way rather than across it. In its opinion of reversal, the Supreme Court treated the accident as exclusively a crossing accident, and held that the evidence was sufficient to warrant the submission of the plaintiff's case to the jury on the question "of permissive crossing at the point where she was injured" (p. 175). So far as appears, the Supreme Court would have affirmed and upheld the nonsuit had it agreed with the lower court in viewing the accident as a longitudinal pathway accident rather than a crossing accident.

Steele v. *Lake Shore & M. S. Ry. Co.*, 238 Pa. 295, 86 Atl. 201 (1913). The evidence showed that, when a direct crosspath was obstructed by cars, pedestrians customarily used a

substitute crossing which involved the use of a path extending a short way alongside the track. The plaintiff was injured on the substitute crossing. The plaintiff's recovery was permitted to stand on the evidence that there was a well-defined crossing.

Lodge v. *Pittsburgh, etc. R. Co.*, 243 Pa. 10, 89 Atl. 790 (1914). Although heretofore cited by plaintiff, this case involved a permissive crossing, not a longitudinal pathway; and the opinion considered the case on no other basis.

Francis v. *B. & O. R. Co.*, 247 Pa. 425, 93 Atl. 490 (1915). Although cited by plaintiff as recognizing permissive rights on a longitudinal pathway, the case involved what was essentially a permissive crossing. The railroad had lengthened, by about 700 feet, the approach to a public crossing by building a Y on the south side of the tracks. Thereafter, as a short-cut in crossing the tracks from the south, pedestrians followed one branch of the Y to the main track, and then walked a short distance along the ties to reach the regular crossing. The decision rested on the *Kay* case, *supra*, as "exactly in point." The accident was essentially a crossing accident similar to that in the *Steele* case, *supra*.

O'Leary v. *Pittsburgh etc R. Co.*, 248 Pa. 4, 93 Atl. 771 (1915). Although heretofore cited by plaintiff as contrary to the *Falchetti* case, the facts indicate otherwise. The injury occurred on a plot used as a playground, partly public and partly railroad property, with no visible separation line. In admitting evidence of permissive use, the court cited the *Steele* case, *supra*, which as already noted was exclusively a permissive crossing case.

Counizzarri v. *Philadelphia etc. Ry. Co.*, 248 Pa. 474, 94 Atl. 134 (1915). Although cited by plaintiff as contrary to the *Falchetti* case, the accident in this case occurred on a permissive strip of the right of way, used as a street, walk and playground, and fronted by private houses having no other access. The decision rested on the *O'Leary* case, *supra*.

Slamovitz v. *Pennsylvania R. Co.*, 266 Pa. 63, 109 Atl. 544 (1920). This is incorrectly cited by plaintiff as a permissive

longitudinal pathway case. The accident occurred on "26th Street," a public street on which the railroad had a siding.

Kremposky v. *Mt. Jessup Coal Co.*, 266 Pa. 568, 109 Atl. 766 (1920). Plaintiff cites this case as contrary to the *Falchetti* holding, but fails to observe that it was not a railroad case. The accident occurred on a trestle for coal cars, on the coal company's private property. The court held that a permissive way over the trestle could be shown.

The foregoing cases comprise all the cases heretofore cited by plaintiff as contrary to the *Falchetti* case. These cases all antedate the *Falchetti* case by twelve years or more. If contrary to the *Falchetti* decision, they were manifestly overruled by that case. But the foregoing comments sufficiently indicate that they were not contrary to the *Falchetti* decision.

Conn v. *Pennsylvania R. Co.*, 288 Pa. 494, 136 Atl. 779 (1927). This case was referred to in the *Falchetti* opinion in the statement that "as the *Conn* and *Kolich* cases show, an alleged permissive way parallel with plaintiff's tracks, and on its right of way, as distinguished from a permissive crossing over them, is not recognized in this State." The present plaintiff quotes the above as showing that the justice who wrote the *Falchetti* opinion was under a misapprehension as to the Pennsylvania law since the *Conn* and *Kolich* cases "stand for no such proposition" (Br. opposing certiorari, pp. 21-2). It may be remarked that Chief Justice Frazer, who wrote the *Falchetti* opinion, also wrote the *Conn* opinion and, together with one or more of the other justices in the *Falchetti* case, participated in the *Conn*, *Tiers* (*infra*) and *Kolich* opinions. Since a large portion of the *Conn* opinion is devoted to a discussion of the special facts, any attempted synopsis would be open to the charge of inadequacy; but we call attention to certain significant expressions. The court stated that the plaintiff was following the tracks "longitudinally" when he was struck by a train (p. 781). The court found "a state of affairs entirely inconsistent with the claim of a public crossing" (p. 782). The

court commented on the fact that the "combined police personnel" of a railroad company "cannot foresee or prevent the innumerable and dangerous trespasses upon and over its tracks daily in a thousand different places along its lines" (p. 784). In distinguishing the case from public crossings, the court approved of the following doctrine (p. 784):

> "But upon its general track, where the public have no equal easement or right of way, a railroad company may operate its trains without regard to the possibility that unauthorized persons may be trespassers thereon. It need not anticipate the presence of such intruders either upon its general track or in its strictly private yards."

Finally, the court arrived at "the conclusion that plaintiff was a trespasser, and that the evidence falls far short of showing the existence of a defined permissive way or crossing over defendant's property at the place of the accident, so no recovery can be had * * *" (p. 784).

Tiers v. *Pennsylvania R. Co.*, 292 Pa. 522, 141 Atl. 487 (1928). The present plaintiff distinguished this case as involving an injury to a person crossing the railroad track at a place where no path existed. As leading up to the *Falchetti* decision, however, the opinion is significant by reason of the broad ground upon which the determination rested. The court said (p. 490):

> "The mere fact that the public generally may use the tracks of a railroad company to walk upon, other than to cross at fixed points, is not sufficient to impose liability upon it. *Kaseman* v. *Sunbury*, 197 Pa. 162, 46 Atl. 1032. If it were bound to keep constant guard against the possible presence of others, wherever it was customary for trespassers or licensees to enter upon its right of way, a proper operation of trains for the convenience of the public would be rendered most difficult, if not impracticable. It is bound to take due precautions to protect those at grade crossings established by law, or definitely fixed by consent, but cannot be held to the same degree of watchfulness in the use of its tracks

generally, to the occupation of which it has the exclusive right, and is not bound to guard against the possibility of intruders thereon."

Kolich v. *Monongahela Ry. Co.*, 303 Pa. 463, 154 Atl. 705 (1931). This case was apparently cited in the *Falchetti* case because of a *dictum* (p. 705) to the effect that the plaintiff in the *Kolich* case could not have recovered if he had been travelling "longitudinally on defendant's right of way", between the rails of a track or between two tracks.

These cases were followed by the *Falchetti* case, 307 Pa. 203, 160 Atl. 859 (1932). In the most definite terms, this case crystallized the Pennsylvania doctrine recognizing permissive rights only on well-defined crossings and denying permissive rights along the right of way, whether the longitudinal routes be marked by beaten paths or not. The foregoing cases show that the rule, thus crystallized in the *Falchetti* decision, is based on two conceptions. The first is that it cannot be supposed that a railroad, merely by failing to take effective prohibitory steps, is consenting to the use of its right of way upon other than well-defined crossings. The second is that the recognition of permissive rights on longitudinal pathways, as distinguished from crossings, would conflict with the public interest since the obligation to take due precautions in such cases would render "most difficult, if not impracticable" "a proper operation of trains for the convenience of the public". Manifestly, these conceptions are based upon or affected by local conditions such as the congestion of population and of railroad traffic in the highly industrialized state of Pennsylvania.

The *Falchetti* case still stands as the unquestioned and settled law of Pennsylvania. While no subsequent Pennsylvania case appears to have involved a well-defined longitudinal pathway, the Pennsylvania courts have reaffirmed the general doctrine denying permissive rights except upon well-defined crossings.

In *Koontz* v. *Baltimore & Ohio R. Co.*, 309 Pa. 122, 163 Atl. 212 (1932), the plaintiff was injured while crossing a

train-yard of the defendant railroad. In reversing a judgment for the plaintiff and entering final judgment for the defendant, the court rested the reversal in part upon the fact that the evidence of user of the yard did not show a user for the purpose of crossing the yard. After stating that the "question as to what constitutes a permissive crossing has been before us several times in recent years" (p. 213), the court said (p. 214):

> "If there were a permissive way across the yard, with a well-marked path leading to the tracks, it would seem that there would necessarily be a well-defined path leading away from the tracks on the opposite side. The most favorable construction that can be placed on the testimony is that it shows a definite way or path to the yard, and nothing to indicate the existence of any path across the tracks or to or from them on the other side. It seems to us that plaintiffs completely failed to prove the existence of a permissive way."

In *Lindsay* v. *Glen Alden Coal Co.*, 318 Pa. 133, 177 Atl. 751 (1935), the railroad maintained tracks on an embankment of culm and cinders, the lower part of which was protected by sloping concrete. The *Falchetti* case was approved in the following language (p. 753):

> "The evidence that people ran up the concrete and then walked at one place or another over the culm bank to the top is not of such character as to establish a right of way or to put an increased burden on defendant in the circumstances disclosed by the evidence. See *Leithold* v. *Railway Co.*, 47 Pa. Super. 137; *Conn* v. *Railroad Co.*, 288 Pa. 494, 136 Atl. 779; *Falchetti* v. *Pennsylvania R. R. Co.*, 307 Pa. 203, 160 Atl. 859."

In *Noonan* v. *Pennsylvania R. Co.*, 194 Atl. 212 (Superior Court of Pennsylvania, September 29, 1937), the plaintiff was struck while on the right of way alongside the track. Although the plaintiff was not on a beaten path, the court recognized the *Falchetti* decision in the following words (p. 215):

"In *Falchetti et ux.* v. *Pennsylvania R. Co.*, 307 Pa. 203, 206, 160 Atl. 859, it was held that even an alleged permissive way parallel with defendant's railway tracks and on its right of way, as distinguished from a permissive crossing over them, is not recognized in this state. See *Conn, et al.*, v. *Pennsylvania Railroad*, 288 Pa. 494, 136 Atl. 779; *Kolich* v. *Monongahela Railway Co.*, 303 Pa. 463, 154 Atl. 705. To approve of appellant's contention that defendant was bound to anticipate the presence of children on its main line tracks would create an unreasonable obligation on defendant and result in a condition whereby the practical operation of its trains would be made impossible. *Tiers* v. *Pennsylvania Railroad Co.*, 292 Pa. 522, 141 Atl. 487; *Koontz et al.* v. *Baltimore & Ohio R. Co.*, 309 Pa. 122, 129, 163 Atl. 212."

Aside from the foregoing cases dealing with permissive paths, it may be noted that the Pennsylvania conception of the standard of care owed by railroads, and of the public interest or public policy involved, was foreshadowed in the case of *Thompson* v. *B. & O. R. Co.*, 218 Pa. 444, 67 Atl. 768 (1907). That was a "turntable case" in which evidence was offered that children were accustomed to go through a fence onto the railroad property. After considering *Railroad Co.* v. *Stout*, 84 U. S. 657, and other cases upholding the "attractive nuisance" doctrine, the court disapproved of the doctrine, declared that the trend was against it, and thereupon repudiated it, holding that the intruders were trespassers rather than licensees and that the only obligation of the railroad was to refrain from wilful or wanton injury. The court observed that a duty of due care in such cases would impose, for the benefit of intruders, an unreasonable restraint upon the beneficial use of land.

Certainly, so far as it lies within the power and vocabulary of the Pennsylvania Supreme Court to establish a Pennsylvania rule of action and conduct for pedestrians and railroads with respect to longitudinal pathways along a right of way in Pennsylvania, that Court has done so in the *Falchetti* case.

POINT III.

The Courts below erred in refusing to recognize the Pennsylvania decisions denying permissive rights on longitudinal pathways as distinguished from crossings.

The obligation of a railroad toward persons on its right of way in Pennsylvania is not regulated by any federal law or state statute. There is squarely presented, therefore, the question of the extent to which the federal courts are bound to recognize state court decisions.

The Pennsylvania decisions denying permissive rights except upon well-defined crossings, as heretofore noted, were ignored by the District Court (see citations under specification of errors to be urged, *supra*, p. 9). In sustaining the District Court the Circuit Court of Appeals regarded it as unnecessary even to "go into" the question of Pennsylvania law since "the great weight of authority in other states is to the contrary" of the Pennsylvania rule asserted by defendant (pp. 394-5).

The opinion of the Circuit Court of Appeals rests on an assumed doctrine that there is a rigid line of demarcation between questions of local law and questions of general law, that while questions of local law are determinable by the local courts questions of general law are determinable by the federal courts according to their own judgment unaffected by decisions of the local courts, that "the question of the responsibility of a railroad for injuries caused by its servants [including the question of permissive rights on its right of way] is one of general law" (p. 395), and that the federal courts are free to decide the question in accordance with their independent judgment or in accordance with the weight of authority in other states, regardless of the decisions in the particular state involved.

We think this assumed doctrine is unsound in theory, that it is typical of many ill-fated attempts to compress into in-

flexible rules of thumb the broad principles applied by this Court, that it has led to an erroneous and flagrantly unjust conclusion in the present case and that, as urged in the petition for certiorari, the problem is of such outstanding importance and marked by such divergence of opinion among the various Circuit Courts of Appeals as to merit the consideration of this Court.

It is no doubt possible to collect isolated statements of this Court seeming to authorize a virtually complete disregard of state court decisions in the field of general law. It may be conceded that many of the criticisms of the supposed doctrine of *Swift* v. *Tyson* (16 Pet. 1) and succeeding cases proceed upon the assumption that these cases sanction this sweeping disregard of state court decisions. It would be idle to deny that some of the cases go to considerable lengths in overriding state court decisions.

Nevertheless, it is believed that any attempted formulation of the doctrine actually applied by this Court is bound to be wide of the mark unless it gives due effect to three outstanding factors which this Court has repeatedly taken into account in determining the extent to which the federal courts are bound by state court decisions. This Court has consistently recognized that there is no federal common law applicable to such cases and that the law to be applied is that of the state; it has considered the extent to which the state court decisions have established the asserted rule of state law; and it has considered the extent to which the disputed question of law is general or local in nature and effect. While recognizing the application of state law as absolute, the Court has treated the factors of establishment and of general or local quality as matters of degree. It has refused to recognize any rigid dividing line between established and unestablished law or between general and local law.

In view of the great frequency with which the question has come before this Court, it would seem impracticable to attempt a detailed analysis of the cases; and we have deemed it more appropriate and useful to discuss the expressions

and considerations which appear to us to reveal the broad principles applied by this Court.

If we read the cases aright, the fundamental doctrine is, first, that the federal courts are bound to give due consideration to state decisions in the light of the principle that the law to be applied is that of the state and, second, that the federal courts, while bound to follow state decisions where they have established an asserted rule of state law with sufficient definiteness and finality, may and should apply more severe and critical tests of establishment according as the disputed question of law is more general in nature and effect, less severe and critical tests according as the disputed question of law is more local in nature and effect.

If the foregoing statement is correct, the Circuit Court of Appeals has misconceived the doctrine of this Court and, it may be added, the persistent criticisms of *Swift* v. *Tyson* and succeeding cases have been largely misdirected.

A. The Pennsylvania Decisions Denying Permissive Rights on Longitudinal Pathways as Distinguished from Crossings Should Have Received Due Consideration in Recognition of the Elementary Principle that the Law to be Applied is the *lex loci delicti*.

It is a thoroughly established principle of conflict of laws that, in tort actions, the *lex loci delicti* governs as to the incidents of negligence such as the standard of care. Since the principle is elementary, we do no more than quote the statement of the rule as given in Restatement, Conflict of Laws, Section 380, page 462:

> "Where by the law of the place of wrong, the liability-creating character of the actor's conduct depends upon the application of a standard of care, and such standard has been defined in particular situations by statute or judicial decision of the law of the place of the actor's conduct, such application of the standard will be made by the forum." (Note the illustration given on p. 463.)

Whatever difficulties there may be in ascertaining the pertinent Pennsylvania law or in fixing the extent to which the federal courts are bound to recognize the pertinent decisions of the Pennsylvania courts, it is settled beyond question that it is the Pennsylvania law which the federal courts, quite as truly as the state courts, are bound to ascertain and apply. There is no such thing as a federal common law applicable in such cases. *Bucher* v. *Cheshire Rd. Co.*, 125 U. S. 555, 583-4; *Smith* v. *Alabama*, 124 U. S. 465, 478-9.[1]

Accordingly, the standard of care owed by the defendant in the present case is that prescribed by the law of Pennsylvania, however that law may be ascertained. In refusing even to "go into" the matter of the Pennsylvania decisions, the Circuit Court of Appeals necessarily rules them out no matter how definite and final they may be in their declaration of the Pennsylvania rule of law. Although each state unquestionably has the power to determine the particular conception of the common law adopted by it and although the common law is acclaimed as being adaptable to changing conditions, the opinion of the Circuit Court of Appeals constitutes an unqualified pronouncement that it is beyond the power of the Pennsylvania courts to determine or evolve the law of Pennsylvania as to permissive rights on railroad rights of way in Pennsylvania. It would seem clear that this is a sweeping repudiation of the principle that the law to be applied is that of the state.

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[1] See also *Carroll County* v. *Smith*, 111 U. S. 556, 563; *McGuire* v. *Sherwin-Williams Co.*, 87 Fed. (2d) 112; *Boston & Maine Rd.* v. *Breslin*, 80 Fed. (2d) 749, cert. den. 297 U. S. 715; *Moore* v. *Backus*, 78 Fed. (2d) 571, cert. den. 296 U. S. 640; *Reed & Barton Corp.* v. *Maas*, 73 Fed. (2d) 359; *Public Service Ry. Co.* v. *Wurthorn*, 278 Fed. 408, cert. den. 259 U. S. 585; *Keystone Wood Co.* v. *Susquehanna Boom Co.*, 240 Fed. 296, cert. den. 243 U. S. 655; *Snare & Triest Co.* v. *Friedman*, 169 Fed. 1, 11, cert. den. 214 U. S. 518.

B. The Pennsylvania Decisions Denying Permissive Rights on Longitudinal Pathways as Distinguished From Crossings Should Have Been Recognized as Controlling Because They Had Established the Rule of Law With Sufficient Definiteness and Finality to Constitute It a Local Rule of Property, Action or Conduct, Even Though the Question Might Otherwise Have Been Regarded as Mainly One of General Law.

It is obvious that the question of permissive rights on a railroad's right of way in Pennsylvania is in some degree a local matter. Postponing a consideration of the local nature of the question, however, our present contention is that the Pennsylvania decisions establish the pertinent rule with sufficient definiteness and finality to be controlling, even though the question be viewed as general or predominantly general in nature.

We do not question the finality of the holding of this Court in *Swift* v. *Tyson*, 41 U. S. (16 Pet.) 1, that the "laws of the several States" referred to in the Rules of Decision Act do not include state court decisions as such. But whether by virtue of the Act or of comity, it is well settled that such decisions are pertinent and, under certain circumstances, controlling in ascertaining or determining the law of the state.

It would be idle to deny that this Court, in matters of a general nature, has exhibited a marked reluctance to recognige nonconformist state rules as settling the question of state law. But even in cases where an asserted rule of the state courts has been rejected, it has been stated or implied that the asserted rule would govern if sufficiently established. Expressions to this effect occur with such frequency and consistency that they must be recognized, we think, as forming a part of the general doctrine on the subject.

Thus, it is repeatedly stated that decisions are merely evidence of the law. In *Swift* v. *Tyson*, 41 U. S. 1, *supra*, Mr. Justice Story justified the exercise by federal courts of

an independent judgment on a question of "general law" relating to negotiable instruments on the ground that decisions are not the law but merely evidence of the law. This was his basic argument in holding that the "laws of the several States" referred to in the Rules of Decision Act do not include state court decisions as such. In amplifying the statement, Mr. Justice Story noted that state court decisions are "often reexamined, reversed, and qualified" by the state courts themselves (p. 18). This frequently repeated argument would seem to carry the clear implication that, as a matter of comity at least and, we think, by virtue of the Rules of Decision Act as well, the federal courts are bound to recognize an asserted rule of state law where the evidence in the form of state decisions is sufficiently conclusive, in other words, when the asserted rule is established with sufficient definiteness and finality.

In the *Swift* case, the Court considered it doubtful if any doctrine on the disputed question could be "treated as finally established" by the New York courts and "certain" that the highest court had not pronounced "any positive opinion upon it" (pp. 17-18).[1] In the present case, the evidence of the Pennsylvania rule now in question is conclusive.

In further justification of the exercise of an independent judgment by federal courts on a question of general law, this Court observed in the *Swift* case that the federal and state courts have the like function of ascertaining the governing rule by "general reasoning and legal analogies" in accordance with principles and doctrines of general jurisprudence (p. 19); and this statement was preceded by the particular

[1] It is true that this Court, in the *Swift* case, after observing that there was no "finally established" New York rule, proceeded to discuss the problem on the assumption that the contested rule had been "fully settled in New York" (p. 18). If this unnecessary assumption were to be given its full import, the case would be an authority for the proposition that there is a domain of general law in which the state courts may never declare or evolve a state rule binding on the federal courts. It is believed, however, that such a harsh doctrine is belied by other expressions in the opinion and, in any event, has been substantially relaxed in subsequent cases.

observation that the courts of New York, the State there involved, resorted to "the general principles of commercial law" for a solution and did not found their decisions upon any fixed local usage (p. 18). Here again the implication would seem to be that the federal courts would follow the state rule if established with such definiteness and finality that the state courts would no longer resort to the general sources of the common law or to general reasoning and legal analogies, but would regard the question as foreclosed in the state.

The equivalent statement that the federal and state courts, in matters of general law, go to the "same sources" to ascertain the applicable rule has repeatedly been made by this Court in justifying the federal courts in exercising an independent judgment. But we think an analysis of such cases shows the meaning to be that the state courts, upon questions of the sort at issue, *in fact* go to the same sources, not that they are *bound* to go to the same sources. When the question of state law is sufficiently open so that it may fairly be said that the state courts themselves would regard it as one of general law to be solved by resorting to these common sources, then the federal courts are manifestly justified in making an independent investigation and determination. But this Court has repeatedly indicated that when the question of state law has been decided with such definiteness and finality as to have established a rule of property, action or conduct in the state, that is, with such definiteness and finality that it can no longer fairly be said that the state courts would resort to the common sources and principles of jurisprudence, then the question is *ipso facto* removed from the domain of general law and the federal courts will thereupon recognize the established state rule.

This Court has so indicated in many cases where the conclusion was that there was no state rule so firmly established as to exclude resort to general principles.

Thus, in *Carpenter* v. *Providence Washington Ins. Co.*, 41 U. S. (16 Pet.) 495, involving the construction of a fire in-

surance policy, the Court, by Mr. Justice Story, rejected the asserted state rule partly because the state decisions were doubtful as to their bearing and results (pp. 511-2).

In *Lane* v. *Vick*, 44 U. S. (3 How.) 464, the Court refused to follow a Mississippi case on the construction of a will because the case involved the question only incidentally and did not establish a rule of property, but specifically stated that it would follow state decisions on the question if they had established such a rule (p. 476).

In *Chicago City* v. *Robbins*, 67 U. S. (2 Black) 418, particularly relied upon by respondent in the present case, the question was whether the negligence of an independent contractor in failing to guard or cover an excavation adjoining a city sidewalk could be imputed to the owner for whom the work was being done. This Court considered an Illinois case, "similar in many of its facts," in which the Illinois Supreme Court held that the owner was not responsible since "the omission to cover the opening in the area did not necessarily occur as an incident to the prosecution of the work." This Court disagreed with this criterion and deemed it to be the owner's duty to see that the excavation was safely guarded. To the argument that the federal courts should follow the rule apparently applied by the Illinois court in the single decision cited, this Court said (pp. 428-9):

> "Where rules of property in a State are fully settled by a series of adjudications, this Court adopts the decisions of the State Courts. But where private rights are to be determined by the application of common law rules alone, this Court, although entertaining for State tribunals the highest respect, does not feel bound by their decisions."

If any inference may be drawn from this language, applicable to the present case, it is that this Court would adopt the Pennsylvania decisions as fully settling the Pennsylvania rule of permissive rights on rights of way in Pennsylvania.

In *Yates* v. *Milwaukee,* 77 U. S. (10 Wall.) 497, where the question of dedication to public use under Wisconsin law turned on common law principles, this Court indicated that state decisions would govern if they established a rule of property, but in refusing to be bound by a particular Wisconsin case, said that even the Wisconsin courts would decide each such case on its special facts, and that the particular case relied on laid down no general governing principle of law. In the present case, the Pennsylvania Supreme Court has unmistakably laid down and established a general governing principle of law.

In *New York Central Rd. Co.* v. *Lockwood,* 84 U. S. (17 Wall.) 357, involving the validity of a general contract exempting the railroad from negligence with respect to drovers on stock trains, this Court rejected the asserted New York rule and, on what it regarded as "sound principles," held the contract void as against public policy, but justified its independent view in part upon the fact that the New York courts had expressed "such diverse views" and had "so recently and with such slight preponderancy of judicial suffrage" reached a contrary conclusion, and then only on special contracts as distinguished from a "contract general in its terms" (pp. 363, 367-8).

In *Burgess* v. *Seligman,* 107 U. S. 20, involving the question whether the defendants were stockholders rather than pledgees, so as to be liable to the creditors of a Missouri corporation, this Court deemed itself to be free to reject an asserted rule of Missouri law inasmuch as the Missouri courts had not established any rule of property or action on the subject when the transactions in suit occurred and when the rights accrued (although subsequent Missouri decisions did rule on the question). At the same time the Court indicated that it would follow established rules of property and action (p. 33):

> "Since the ordinary administration of the law is carried on by the State courts, it necessarily happens that by the course of their decisions certain rules are estab-

> lished which become rules of property and action in the State, and have all the effect of law, and which it would be wrong to disturb. This is especially true with regard to the law of real estate and the construction of State constitutions and statutes. Such established rules are always regarded by the Federal courts, no less than by the State courts themselves, as authoritative declarations of what the law is. But where the law has not been thus settled, it is the right and duty of the Federal courts to exercise their own judgment; as they also always do in reference to the doctrines of commercial law and general jurisprudence."

While the final clause of this quotation, taken by itself, might seem to declare that the federal courts are absolutely independent of state court decisions in certain fields of the law, it is to be noted that the clause is limited by the further statement, occcuring in the same paragraph, that "it would be a dereliction of their duty not to exercise an independent judgment in cases not foreclosed by previous adjudication" (p. 34). In the present case, unlike the *Burgess* case, the state courts had already foreclosed the pertinent question when the cause of action arose.

In *Baltimore & Ohio Rd. Co.* v. *Baugh,* 149 U. S. 368, in justifying an independent judgment on a negligence question, arising in Ohio, as one of general law, this Court deemed it "significant" that the Ohio Supreme Court itself regarded the question "as one of common or general law," and it was noted that the Ohio court was "not wholly satisfied" with its asserted rule or doctrine (pp. 376-7). While the case contains very comprehensive language as to the independence of the federal courts in matters of general law, the Court repeated the language of the *Burgess* case heretofore quoted including the declaration of a duty to exercise an independent judgment "in cases not foreclosed by previous adjudication" (pp. 372-3). As hereafter pointed out, the question at issue was not local in any such sense or degree as that at issue in the present case. The immediate point, however, is that the language referred to recognizes that a

question may be foreclosed by previous state adjudications, even in a matter of general law.

In *Barber* v. *Pittsburgh etc. Ry. Co.*, 166 U. S. 83, the Court considered the extent to which state decisions evidenced the law of the state. The question certified to this Court was whether a particular Pennsylvania decision concluded the federal courts on the construction of a devise of Pennsylvania land. The Court stated that a single decision on the construction of a particular devise "is not conclusive evidence of the law of the State" (p. 100) and, upon a further examination of the Pennsylvania cases, concluded that they showed no settled rule on the question (pp. 103-4). It was conceded that a settled rule would control (p. 99). Manifestly, the inference is that state decisions, although not *per se* constituting the law of the state, may be such as to conclusively evidence that law.

In *Kuhn* v. *Fairmont Coal Co.*, 215 U. S. 349, a tort action involving the question whether the seller of unmined coal in West Virginia was entitled to have the surface supported, this Court, quoting at length from the *Burgess* decision, deemed itself to be free to reject an asserted rule of West Virginia law inasmuch as the West Virginia courts had not established any rule of property or action on the subject when the transactions in suit occurred and when the rights accrued (although subsequent West Virginia decisions did rule on the question). In thus following the *Burgess* case, the Court reasserted that where the law of the state has not been so settled by state decisions as to constitute "rules of property and action in the State", it is "the duty of the Federal court to exercise its own judgment, as it also always does when the case before it depends upon the doctrines of commercial law and general jurisprudence". As in the *Burgess* case, this final clause is qualified by the reassertion of the duty of the federal courts to "exercise an independent judgment in cases involving principles not settled by previous adjudications" (p. 360). While rejecting the asserted

West Virginia rule, it was specifically recognized that "a wholly different question would have been presented" if, before the rights of the parties were fixed, the asserted rule "had become a settled rule of law in West Virginia, as manifested by decisions of its highest court" (p. 361).

In *Black and White Taxicab Co.* v. *Brown and Yellow Taxicab Co.*, 276 U. S. 518, there was in question the validity of a contract whereby a railroad gave to the plaintiff taxicab company the exclusive privilege of going upon railroad property, at a station in Kentucky, for the purpose of soliciting patronage and parking its cabs. In refusing to follow two Kentucky decisions which held similar contracts void as tending to monopoly and contrary to the public interest, this Court used language which we quote as typical of the strongest expressions which may be cited against the doctrine for which we are contending. In holding that the Rules of Decision Act did not apply, the Court said (pp. 529-30):

> "* * * There is no question concerning title to land. No provision of state statute or constitution and no ancient or fixed local usage is involved. For the discovery of common law principles applicable in any case, investigation is not limited to the decisions of the courts of the State in which the controversy arises. State and federal courts go to the same sources for evidence of the existing applicable rule. The effort of both is to ascertain that rule. Kentucky has adopted the common law and her courts recognize that its principles are not local but are included in the body of law constituting the general jurisprudence prevailing wherever the common law is recognized. * * * The applicable rule sustained by many decisions of this Court is that in determining questions of general law, the federal courts, while inclining to follow the decisions of the courts of the State in which the controversy arises, are free to exercise their own independent judgment."

But among the "many decisions" cited by the Court were substantially all of the cases above considered, including the

Burgess, Baltimore & Ohio and *Kuhn* cases. The inference would seem to be warranted that the above language was not intended to overrule the qualification that the asserted independence applies to "cases involving principles not settled by previous adjudications"; and it may be noted that Mr. Justice Holmes (dissenting opinion, concurred in by Mr. Justice Brandeis and Mr. Justice Stone) did not regard the prevailing opinion as intended to deny the recognized principle "that a settled line of state decisions was conclusive to establish a rule of property or the public policy of the State. *Hartford Fire Insurance Co.* v. *Chicago, Milwaukee & St. Paul Ry. Co.*, 175 U. S. 91, 100" (p. 536). Of the two Kentucky cases to which this Court was asked to yield, the first considered the problem as one of first impression and concluded that the contract tended to monopoly and was contrary to the public interest; the second, after considering the conflict of views in other jurisdictions, saw "no reason for changing the rule" of the earlier Kentucky case; and each case examined in detail the particular facts tending to create a monopoly and to defeat the public interest. In the *Taxicab* case this Court observed that no inconvenience to the public was shown in the case before it and that it would be unwarranted to "assume" that the contract was "contrary to public interest" (p. 529). Under such circumstances it might reasonably be said that the question at issue had not been foreclosed or settled by the previous Kentucky adjudications.

We think that a case is properly to be regarded as depending "upon the doctrines of commercial law and general jurisprudence" only when the pertinent principle or rule of law has not been definitely settled, foreclosed or established so as to have become a rule of property, action or conduct in the state. Obviously, a case is not regarded as depending "upon the doctrines of commercial law and general jurisprudence" when the applicable state rule is established by state statute, even though the statute deals with a

matter which but for the statute would unquestionably come within the scope of commercial law and general jurisprudence.[1] It would seem equally obvious that a case is not to be regarded as depending "upon the doctrines of commercial law and general jurisprudence" when there is an applicable state rule of property, action or conduct, *definitely and finally established as such* by decisions of the highest state court, even though the decisions deal with a matter which but for such established rule would unquestionably come within the scope of commercial law and general jurisprudence.

In attempting to frame and apply a comprehensive rule based on the distinction between "general law" and "local law", a number of federal courts including the Circuit Court of Appeals in the present case have failed to note that "local law", if it is to be the criterion in any such rule, must be construed as including not only state rules of law upon matters inherently local in nature or subject matter but also state rules of law which are local only in the sense that they are peculiarly established in the state, whether by statute or by decisions. Thus, state statutes and their construction by state courts are included among "state laws strictly local", regardless of whether the subject matter is general or local (Mr. Justice Story in *Swift* v. *Tyson*, 16 Pet. 1, 18), and state court decisions have been viewed as transforming into local law what otherwise would be called general law. Thus, in the frequently cited case of *Snare & Triest Co.* v. *Friedman*, 169 Fed. 1 (cert. den. 214 U. S. 518), involving a general question of the law of negligence, the Court refused to follow a particular state decision because

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[1] And it is settled by the more recent cases in this Court that this is true even though the state courts characterize the statute as declaratory of the common law (as in statutes adopting the uniform negotiable instruments law) while adopting a construction at variance with the federal court's conception of the pertinent doctrines of commercial law and general jurisprudence. *Burns Mortgage Co.* v. *Fried*, 292 U. S. 487; *Marine Bank* v. *Kalt-Zummers Co.*, 293 U. S. 357.

it was not regarded as establishing a rule of conduct on the subject, but said (p. 12):

> "And as to what the common law of a state may be, the best evidence is generally found in the settled line of decisions of the state court, so accepted and recognized as to constitute a general rule of property or conduct. More latitude, however, is practiced in questions that depend upon a common law, not merely part of the local and customary law of the state, but common to all states and countries where what is known as the 'common law' prevails. On these questions, the courts of the United States do not hold themselves bound by the decisions of the courts of the state, unless, perchance, such decisions have so clearly established a settled rule in the premises as to make it part of the peculiar and local law of that state."

However strongly this Court has felt the desirability of uniformity in matters of a general nature and however reluctant it has been to recognize non-conformist state rules as settling the question of state law, it has nevertheless recognized such rules as controlling when established, by state court decisions, with sufficient definiteness and finality to constitute rules of property, action or conduct.

In *Bucher* v. *Cheshire Rd. Co.*, 125 U. S. 555, the asserted Massachusetts rule was that a plaintiff could not recover for a railroad's negligence when the injury occurred while the plaintiff was illegally travelling in Massachusetts on Sunday. Although incidentally involving a state statute against Sunday travel, the question was one of common law, as noted by Judge Taft in *Byrne* v. *Kansas City, Ft. S. & M. Rd. Co.*, 61 Fed. 605. After discussing the general question at length and pointing out that "there is no common law of the United States", this Court said (pp. 583-4):

> "It is in regard to decisions made by the state courts in reference to this law, and defining what is the law of the State as modified by the opinions of its own courts, by the statutes of the State, and the customs and habits of the people, that the trouble arises."

POINT IV.

The Courts below erred in refusing to hold plaintiff contributorily negligent as matter of law; and, in particular, the Circuit Court of Appeals erred in applying an unsound test as to whether the question was for the jury.

As shown in the statement of facts in the Petition, *supra*, the plaintiff, according to his own testimony, was deliberately and unnecessarily walking alongside the track in complete darkness with his right side within possibly a foot of the moving train when he was struck by some projection which, on the trial if not in his sworn bill of discovery, he thought looked like a car door.

The Circuit Court of Appeals regarded plaintiff's conduct as "imprudent" but nevertheless regarded the question as one for the jury for the stated reason that the allowance of recoveries in other cases, deemed to be similar, indicated that fairminded men might differ from them; and this conclution purported to be pursuant to the rule of *Richmond & Danville Rd. Co.* v. *Powers*, 149 U. S. 43, 45, and *Texas & Pac. Ry. Co.* v. *Harvey*, 228 U. S. 319.

The familiar rule, as stated in the latter case, is as follows (p. 324):

> "Where there is uncertainty as to the existence of negligence or contributory negligence, whether such uncertainty arises from a conflict of testimony or because, the facts being undisputed, fairminded men might honestly draw different conclusions therefrom, the question is not one of law."

It would seem obvious that the Circuit Court of Appeals did not apply this rule. It held the question to be for the jury, not because fairminded men might differ as to the existence of negligence, but because other courts (in cases

deemed to be similar) have thought that fairminded men might differ as to the existence of negligence.

We think a reading of the opinion renders it clear that this criticism is more than a verbal one. The apparent intent and the inevitable effect of the rule applied by the Circuit Court of Appeals is that the cases which are most extreme in holding that fairminded men might differ, *ipso facto* establish the criterion for all other courts. If the court is to yield its own judgment to that of other courts, there is no more reason for yielding to the courts which have been most extreme in holding negligence to be a question of fact than there would be for yielding to the courts which have been most extreme in holding negligence to be a question of law. If there is any blind presumption in the matter, it is in favor of the courts that have taken a position between the two extremes.

The vice of the rule applied by the Circuit Court of Appeals is indicated by the cases cited as involving "closely similar circumstances". In none of them was there any such deliberate flirting with danger as that exhibited by the plaintiff in this case. In *Schultz* v. *Erie R. Co.*, 46 F. (2d) 285, the plaintiff was five feet from the track at a public crossing. In *Pruitt* v. *Southern Ry. Co.*, 167 N. C. 246, 83 S. E. 350, the plaintiff was four to five feet from the track at a public crossing. In *Missouri K. & T. Ry. Co.* v. *Scarborough*, 29 Tex. Civ. App. 194, 68 S. W. 196, a child was on a private loading skidway, about four feet from the edge which, in turn, was six inches to two feet from the cars. In *St. Louis, S. W. Ry. Co.* v. *Wilcox*, 51 Tex. Civ. App. 3, 121 S. W. 588, the plaintiff was on a station platform, five feet from the train. In *Texas & P. Ry. Co.* v. *Greene*, 291 S. W. 929, affirmed by Tex. Com. App. 299 S. W. 639, the plaintiff was at a street grade crossing when the sudden stopping of the train caused a door to swing open and hit him. In *Chesapeake & O. Ry. Co.* v. *Davis*, 22 Ky. Law Rep. 748, 58 S. W. 698, the plaintiff was two and a half to three feet from the train at a public crossing in a populous place. In *Sullivan*

v. *Vicksburg S. & P. R. Co.*, 39 La. Ann. 800, 2 So. 586, the plaintiff was in the middle of a walk constructed by the railroad for passengers. In *Munroe* v. *Pennsylvania R. Co.*, 85 N. J. L. 688, 90 A. 254, the plaintiff was three feet from the edge of a station platform. In none of the cases was it dark.

The single case cited by the Circuit Court of Appeals in which the plaintiff was found to be contributorily negligent as matter of law was a case decided by the same Court, namely *Delaware & H. R. Co.* v. *Wilkins*, 153 F. 845. The case was distinguished as inapposite because the plaintiff was there struck by a fixed structural part of a train whereas the jury was permitted to find that the present plaintiff was struck by a negligently permitted projection. Of course, the existence or non-existence of negligence on the railroad's part does not determine the issue as to the plaintiff's contributory negligence.

The rule stated by this Court in the case above cited is too well settled to justify amplification. It has been recently reiterated in *Pokora* v. *Wabash Ry. Co.*, 292 U. S. 98. We think it is clear that the Circuit Court of Appeals has distorted the rule in application as well as in statement. If this Court should sanction the reasoning of the Circuit Court of Appeals and accept its substantial modification of the correct rule, it would thereby lend its aid to the crystallization of a new rule to the effect that the question of contributory negligence is for the jury unless the injured person has propelled himself against a structural part of the train.

It is respectfully urged that the cases cited by the Circuit Court of Appeals, in conjunction with the rule applied by the Court in disregard of its own judgment, show beyond question that the defendant has been denied the benefit of a proper judicial determination upon the question of plaintiff's contributory negligence. It would seem to us to be of general importance that the novel test applied by the Circuit Court of Appeals with respect to contributory negligence should not be permitted to stand.

The conclusion was that the Massachusetts decisions had adequately established the asserted rule to render it controlling.

It would seem to us that the many expressions of this Court above referred to can be harmonized as part of a consistent doctrine only by recognizing that matters which otherwise would be regarded as dependent on principles of "general law" or of "commercial law and general jurisprudence" are not so regarded when, in a particular state, the pertinent rule has been so definitely and finally established as to "settle" or "foreclose" the question and constitute a rule of property, action or conduct in the state. If this conclusion is sound, then the Pennsylvania decisions have manifestly established the Pennsylvania rule of permissive rights on a railroad's right of way with sufficient definiteness and finality to constitute it a Pennsylvania rule of conduct, binding on the federal courts.

C. The Pennsylvania Decisions Denying Permissive Rights on Longitudinal Pathways as Distinguished From Crossings Declare a Pennsylvania Rule Sufficiently Local in Nature to be Controlling, Even Though More Definiteness and Finality Might Be Required in a Rule of a More General Nature.

As heretofore contended, we think the cited Pennsylvania decisions have established the Pennsylvania rule as to permissive rights and rights of way with such definiteness and finality that the rule would control even if it could be described as general in nature.

It is manifest, however, that the Pennsylvania rule is, in a large measure, local in its nature. It rests expressly on a local policy relating to the efficient operation of railroads, a policy which presumably was dictated by local conditions.

This Court has repeatedly indicated that the nature of a contested rule, whether general or local, is a question of

degree, and that the requirements as to definiteness and finality of establishment are less exacting accordingly as the rule is more local in nature.

Thus, on the construction of a local statute relating to local matters, the federal courts are disposed to follow even local administrative interpretations when local decisions are lacking (*Fox* v. *Standard Oil Co.*, 294 U. S. 87), or they await a state court decision when practicable (*Thompson* v. *Consolidated Gas Utilities Corp.*, 300 U. S. 55, 74).

As to state rules of property, which constitute a classic example of "local law", it is of course true that there must be some degree of establishment to render them controlling (*Gibson* v. *Lyon*, 115 U. S. 439; *Lane* v. *Vick*, 3 How. 464); but innumerable cases in this Court demonstrate that the requirements as to establishment are much less exacting than in matters of a more general nature or concern. Thus, the federal courts may yield to a pertinent state decision even though doubtful of the establishment of the rule involved (*Hulburd* v. *Commissioner*, 296 U. S. 300); and, if the rule is definitely established, will not concern themselves with the logic of its derivation even when expressly contrary to holdings of the Supreme Court (*United States* v. *Robbins*, 269 U. S. 315).

That the local nature of a contested rule is a question of degree was clearly indicated in the recent case of *Mutual Life Ins. Co.* v. *Johnson*, 293 U. S. 335. On the construction of an insurance policy, determinable by the law of Virginia, this Court yielded to a Virginia case with the comment (pp. 339-340):

> "At least in cases of uncertainty we steer away from a collision between courts of state and nation when harmony can be attained without the sacrifice of ends of national importance * * *. With choice so 'balanced with doubt', we accept as our guide the law declared by the state where the contract had its being."

A question otherwise general in nature may be treated as local when affected by a local policy. Mr. Justice Story so intimated in *Carpenter* v. *Providence Washington Ins. Co.*, 41 U. S. (16 Pet.) 495. In treating the construction of a fire insurance policy as a matter of general law, he noted that the contract was "by no means local in its character, or regulated by any local policy or customs" (pp. 511-2). And in *Northwestern Life Ins. Co.* v. *Johnson*, 254 U. S. 96, involving the validity of an incontestability clause where the insured committed suicide, this Court specifically stated that "The public policy with regard to such contracts is a matter for the States to decide" (p. 100).

In *Hartford Insurance Co.* v. *Chicago etc. Ry. Co.*, 175 U. S. 91, there was involved the question of the validity of a contract exempting the defendant railroad from liability for fire with respect to a warehouse on its property in Iowa. The plaintiff insurance companies (subrogated to the rights of the lessee of the warehouse) asserted that the exemption clause was void as against public policy, relying in particular on an Iowa statute providing that no contract should exempt any railway transportation company "from liability of a common carrier" which would exist in the absence of such contract (p. 104). The highest court of Iowa, in a similar case, had held that the public policy expressed in the statute applied only to cases where the railroad entered into the contract as a common carrier, that there was a "paramount public policy" favoring freedom of contract, and that this paramount policy governed since there was no public interest in an exemption clause relating to leased property on the railroad's right of way (pp. 105-7). This Court stated the general rule that questions of public policy, when not controlled by general principles "of national or universal application" are governed by the law of the State, as expressed in its own constitution and statutes, or declared by its highest court" (p. 100); the Court then considered Iowa statutes and decisions deemed illuminating upon the

question of the public policy of the state with respect to the liability of a railroad in reference to its right of way and adjoining lands; and the Court concluded that the Iowa decision above referred to, "being upon a question of statutory and local law, was rightly followed by the Circuit Court" (p. 108). In weighing the significance of this concluding statement, it should be noted that the Iowa decision held that the Iowa statute invoked against the railroad did not apply, and hence the question turned on Iowa public policy independent of statute.

In *Hairston v. Danville & W. R. Co.*, 208 U. S. 598, this Court indicated that it would similarly yield to State court decisions on the question of what constituted "public uses" within the state. The railroad sought to condemn land in Virginia belonging to Hairston in order to construct a spur track to the factory of a single large shipper. This Court agreed with Hairston's contention that a condemnation for private uses would contravene the Fourteenth Amendment, but accepted the holding of the highest court of Virginia that the condemnation in question was for a public use. Referring to decisions in various states, the Court said (pp. 606-7):

> "But when we come to inquire what are public uses for which the right of compulsory taking may be employed, and what are private uses for which the right is forbidden, we find no agreement, either in reasoning or conclusion. * * * The determination of this question by the courts has been influenced in the different states by considerations touching the resources, the capacity of the soil, the relative importance of industries to the general public welfare, and the long-established methods and habits of the people. In all these respects conditions vary so much in the states and territories of the Union that different results might well be expected. * * * The propriety of keeping in view by this court, while enforcing the Fourteenth Amendment, the diversity of local conditions, and of regarding with great respect the judgments of the state courts upon what should be deemed public uses in that state, is expressed, justi-

> fied, and acted upon in [cited cases in the United States Supreme Court] * * *. We must not be understood as saying that cases may not arise where this court would decline to follow the state courts in their determination of the uses for which land could be taken by the right of eminent domain. The cases cited, however, show how greatly we have deferred to the opinions of the state courts on this subject, which so closely concerns the welfare of their people."

The Pennsylvania rule as to permissive rights on a railroad's right of way is specifically based on considerations of public policy and is closely related to the question of public uses. The Pennsylvania rule clearly lacks the features of a general nature which were emphasized in the only case in this Court cited by the Circuit Court of Appeals, namely, *Baltimore & Ohio Rd. Co.* v. *Baugh*, 149 U. S. 368, *supra*. On a question of assumption of risk under the fellow servant doctrine, raised by an injury to a fireman caused by the engineer's negligence while the train was in Ohio, this Court noted that the Ohio decisions invoked by the plaintiff decided the question "as one of common or general law" and not "upon anything of a local nature" (pp. 376-7). In reaching a contrary conclusion on the question, this Court said (p. 378):

> "* * * it is a question in which the nation as a whole is interested. It enters into the commerce of the country. * * * The lines of this very plaintiff in error extend into half a dozen or more States, and its trains are largely employed in interstate commerce. As it passes from State to State, must the rights, obligations and duties subsisting between it and its employees change at every state line?"

Such cases as *Myrick* v. *Michigan Central R. R. Co.*, 107 U. S. 102, *Beutler* v. *Grand Trunk Ry.*, 224 U. S. 85, and *Central Vermont Ry.* v. *White*, 238 U. S. 507, heretofore cited by respondent, are similarly distinguishable from the present case.

In this connection may be noted the case of *Boston & Maine Rd.* v. *Breslin*, 80 F. (2d) 749 (C. C. A. 1, 1935), cert. den. 297 U. S. 715, one of the cases cited in our application for certiorari as showing that the decision of the Circuit Court of Appeals in the present case is in conflict with the decisions of other Circuit Courts of Appeals on essentially the same matter. In the *Breslin* case, the court followed the Massachusetts rule rejecting the attractive nuisance doctrine in turntable cases, and held the railroad only to the obligation to refrain from wilful or wanton injury to a child as a trespasser. The court distinguished the *Baltimore & Ohio* case and similar cases as resting on very different considerations.

The present question relating to longitudinal pathways is much more closely analogous to that raised in *Detroit* v. *Osborne*, 135 U. S. 492 (distinguished in the *Baltimore & Ohio* case at pp. 373-4). On the question of the liability of a municipal corporation for negligence in failing to keep a sidewalk in repair, this Court said, in recognizing the Michigan decisions as controlling (p. 498):

> "Whatever our views may be as to the reasoning or conclusion of that court, is immaterial. * * * There should be, in all matters of a local nature, but one law within the State; and that law is not what this court might determine, but what the Supreme Court of the State has determined. A citizen of another State going into Michigan * * * walks the streets and highways in that State, entitled to the same rights and protection, but none other, than those accorded by its laws to its own citizens."

We think it is well within the boundary lines laid down by this Court to conclude that the Pennsylvania rule denying permissive rights except upon well-defined crossings is marked by two outstanding and decisive characteristics.

In the first place, the rule deals with a matter which is predominantly local in nature. It applies solely to railroad rights of way in Pennsylvania. It is based on a public pol-

icy derived from local conditions affecting the efficient operation of railroads in the public interest. In this respect it differs substantially from the asserted state rule rejected in the *Baltimore & Ohio Railroad* case. The rule there involved, namely, the fellow-servant rule as applied between engineer and fireman on a moving train, had no practical relation to local conditions in the state through which the train happened to be passing. Similarly, in the *Tawicab* case, which we think is the strongest case citable on the plaintiff's behalf, there was no suggestion that the propriety of granting the exclusive privilege of soliciting patronage on the railroad's property was affected by any local conditions in Kentucky. So, the decision in *Chicago* v. *Robbins* (*supra*, p. 30) turned on the general question whether the omission to guard an excavation was an incident to the construction for which the defendant had contracted, a question which manifestly had no relation to local conditions in the state. Unlike the asserted rules in those cases, the Pennsylvania rule here invoked is expressly based on the holding that, consistently with public interest in Pennsylvania whatever may be the case in other states, the railroads cannot be required to anticipate the presence of intruders on the regular right of way devoted to the operation of trains, except at well-defined crossings. Is it conceivable that the federal courts may deny to the Pennsylvania courts the power effectively to establish such a rule of action and conduct within the borders of the state?

In the second place, the Pennsylvania rule here invoked, in view of its substantially local nature, is established with sufficient definiteness and finality to be controlling. It may be the position of this Court that matters of a predominantly general nature are not foreclosed against the independent judgment of the federal courts unless the state decisions relate strictly to titles to real estate or unless they merely recognize fixed customs of a more or less "ancient" nature, although, as heretofore argued, we do not think the Court

has committed itself to any such extreme doctrine. But, however that may be, the cases above cited demonstrate beyond question that this Court requires no such degree of establishment in the case of state rules of law on matters of a largely local nature. The Pennsylvania cases have unmistakably and definitely established the Pennsylvania rule that permissive rights on the main right of way are confined to well-defined crossings. Even if the *Falchetti* case were the only case in point, which it is not, it is so definite and unequivocal in its declaration of the governing principle as to be controlling on a matter of such a local nature. Even a single decision, if "clear and unequivocal", and constituting a "definitive holding", should be recognized as controlling. *Hawke* v. *Hamill*, 288 U. S. 52.

However strongly the argument for "uniformity" may favor the independence of the federal courts in matters of such a general nature as that involved in the *Baltimore & Ohio* case, it operates with at least equal force in favor of adherence to state decisions in matters of such a local nature as those involved in the *Detroit* case and the present case. Since the Pennsylvania courts are under no obligation to yield to the federal courts, and presumably would consider that they could not do so under the doctrine of *stare decisis*, the prospect under the present decision of the Circuit Court of Appeals is that railroads in Pennsylvania will owe—or rather will have owed—one duty to residents who sue in the State courts and another to those who, by establishing a residence without the state or otherwise, are able to capitalize on a diversity of citizenship.[1] The Circuit Court of Appeals is not here exercising the legitimate function of preventing state favoritism as between citizens of different states; it is itself creating a discrimination.

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[1] The present plaintiff, a citizen and resident of Pennsylvania, could have sued the defendant in the Pennsylvania state courts (pp. 2-3, 5; Purdon's Penn. Statutes, Title 67, §§491-2).

Searle and Rock Streets, walking along Searle Street to Hughes Street and down Hughes Street to his home, thus completely avoiding the defendant's right of way.

In our brief (p. 5) we dealt, accurately and fairly we think, with the matter of plaintiff's proximity to the train. We cited plaintiff's testimony that the path on which he was walking as the engine passed him was about two feet wide (R., pp. 21-2, 42); and we emphasized as the most significant factor plaintiff's own concession that he might have been within a foot of the side of the train (R., p. 44). The plaintiff's brief endeavors to convey the impression that the width of the longitudinal path at the point of the accident must be taken as about four feet (Br., p. 3, R., pp. 26, 157). A reference to this testimony (including R., p. 25) indicates that the asserted width of more than two feet applied to the diagonal path coming out from the end of Hughes Street and running up to the track. The plaintiff as the only witness to his location at the time of the accident nowhere suggested that the width of the longitudinal path, on which he was concededly still walking at the instant of the accident, was more than about two feet at the point of the accident or elsewhere. While plaintiff asserted that he had just reached the intersection of the wider diagonal path, he admitted that he had not yet turned or taken a step down the diagonal path (R., p. 72, 79; and see our main brief pp. 7-9) and he specifically identified his position as being squarely on the longitudinal path at the point marked x on Plaintiff's Exhibit 1 (R., pp. 79, 353). In this connection it should be noted that plaintiff's brief (p. 29) distorts plaintiff's testimony in the statement that the structural parts of the train "safely cleared him by a distance which he estimated in his testimony to be from 1 to 2 feet (p. 44)." The plaintiff's testimony was that his best recollection was that he might have been *"within* one or two feet * * * of the sides of these moving cars" (R., p. 44, Italics ours).

To avoid the imputation of contributory negligence, plaintiff seeks the benefit of the most favorable inferences as to

CONCLUSION.

It is urged on behalf of the petitioning defendant: first, that the plaintiff was a trespasser under the applicable Pennsylvania law, and is barred from recovery since there was no showing of wilful or wanton negligence on the defendant's part; second, that even if plaintiff's bare arrival at the diagonal crosspath could be regarded as imposing upon the defendant an obligation of due care toward the plaintiff as a licensee, the asserted arrival involves a disputed question of fact which, under the applicable Pennsylvania law, should have been submitted to the jury with an instruction to bring in a verdict for the defendant in the event of a finding that the plaintiff had not arrived at the diagonal crosspath; and, third, that the plaintiff, upon his own testimony, was guilty of contributory negligence as a matter of law.

Should the Court reach either the first or third of these conclusions, the judgment below should be reversed and final judgment directed in favor of the defendant. Should the Court reach only the second of the above conclusions, the judgment below should be reversed and a new trial ordered.

Respectfully submitted,

WILLIAM C. CANNON,
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HAROLD W. BISSELL,
Counsel for Petitioner.

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IN THE

Supreme Court of the United States,

OCTOBER TERM—1937.

No. 367.

ERIE RAILROAD COMPANY, (a New York corporation),

Petitioner,

against

HARRY J. TOMPKINS,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

REPLY BRIEF ON BEHALF OF PETITIONER ERIE RAILROAD COMPANY.

WILLIAM C. CANNON,
THEODORE KIENDL,
HAROLD W. BISSELL,
Counsel for Petitioner.

THE BALLOU PRESS NEW YORK

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In the

Supreme Court of the United States,

October Term—1937.

Erie Railroad Company (a New York corporation), Petitioner, against Harry J. Tompkins, Respondent.	No. 367.

On Writ of Certiorari to the United States Circuit Court of Appeals for the Second Circuit.

REPLY BRIEF ON BEHALF OF PETITIONER ERIE RAILROAD COMPANY.

As to the Facts.

It seems desirable to deal briefly with certain differences in the statements of facts in the main briefs.

In our brief (p. 5) we stated that the plaintiff could have reached his home without inconvenience by the regular public thoroughfares (citing pp. 27, 59-61 of the Record). The plaintiff's brief states that the route taken by plaintiff "was the shortest and most direct route to his home" (Br., p. 2). Our citations, together with plaintiff's Exhibit 1 (cited by Pltf.) show conclusively that plaintiff would have taken the shortest and most direct route, as well as the safe route to his home, by leaving the automobile at the intersection of

his distance from the train (Br., p. 3), placing the longitudinal path "2 to 2½ feet from the ties" and widening the path (contrary to the evidence as above noted) "to about 4 feet." It may be observed that the net result of applying these favorable inferences would be to place the plaintiff beyond the reach of the alleged swinging door which, according to his testimony (R., p. 65), projected two feet from the side of the car.

In our brief (pp. 5-7) we disclosed the vagueness and inconsistency of plaintiff's testimony that he was hit by a "black object that looked like a door" to him; and it is to be noted that the jury was permitted to find for plaintiff only upon finding that plaintiff was "struck by the door of a freight car" (R. p. 350). Plaintiff's testimony was that he was struck after "a few cars" had passed him (R. p. 50); plaintiff's verified bill of discovery stated that plaintiff was struck by a projection from "either the third or fourth car" of the train (R. p. 8) and the proposed interrogatories thereunder related only to the first four cars (R. p. 11); and the plaintiff's bill of particulars stated that "the projection extended from one of the cars immediately following the engine" (R. p. 15). The uncontroverted evidence was that the only cars in the train having hinged doors such as might meet plaintiff's description of the object which struck him were three refrigerator cars.

With this background, plaintiff's brief makes a patent attempt to indicate that the fourth car was a refrigerator car (Br., p. 2) and follows this with a statement that defendant's witnesses "clearly attempted to conceal the true order of the cars on the train" (Br., p. 4). The uncontroverted evidence was that the refrigerator car to which plaintiff's brief refers was the 17th car from the rear or the 22nd car from the head of the 38-car train, and that the refrigerator car nearest the engine was the 15th car (R. pp. 187-9). The statement that the defendant's witnesses attempted to conceal the true order of the cars is inexcusable. The only basis for the statement is the difference in the order of listing the

cars in defendant's Exhibits E and F and plaintiff's Exhibit 7. The differences were carefully accounted for by defendant's witnesses on direct examination. Thus, it was voluntarily explained that Exhibit E records an inspection in which the inspector started forward from the 14th car from the rear and went completely around the train in making his inspection (R., pp. 181-191), that Exhibit F listed the cars from head to rear (pp. 191-2), and that Exhibit 7 listed them from rear[1] to head (R., pp. 282-3, 312-3, 323). An examination of the exhibits readily confirms this testimony.

Plaintiff's brief conveys the false impression that two cars, on the wheels of which blood stains were found, formed a part of the train and were improperly omitted from these lists (Br., p. 4, referring to R. p. 255). The undisputed evidence was that the inspection which resulted in the finding of blood stains was made at Penobscot, some hours after the accident, after the train had been delivered to the Central Railroad of New Jersey at Ashley and "broken up" and after some of the cars had been moved on to Penobscot, that the inspection was made by an inspector of that road, that the inspection included some cars which were never a part of the train in question, that blood stains (which may or may not have been human) were found on seven enumerated cars of which the first and third had not formed a part of the train in question, and that five of the cars with blood stains had been a part of the train (R., pp. 249-256). By reference to defendant's Exhibit F, it will be seen that the cars with blood stains were the 4th, 7th, 8th, 13th and 16th cars of the train in question, counting from the head of the train.[2]

Thus, the testimony to which plaintiff's brief refers furnishes absolutely no evidence whatever of any attempt of defendant at concealment. But it is interesting to note that, if the blood on the Erie cars was that of the plaintiff as his

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[1] Except that Exhibit 7 does not list three cars added at the rear of the train after the inspection (R. pp. 282-3, 292, 312).

[2] The thirteenth car, PRR 52979, apparently due to typographical error, is given as PRR 52659 at Record, page 255.

brief assumes, the testimony conclusively demonstrates that plaintiff was not struck by a door of the type which he described since the first refrigerator car was the 15th from the head of the train, and it corroborates plaintiff's original position that the car involved in the accident was one of the first four cars. The emptiness of the further charges as to inspection (Pltf.'s Br., pp. 4-5) will be apparent upon examining the plaintiffs own citations to the record.

As to the Pennsylvania Rule as to permissive rights on the right of way.

Plaintiff's brief (pp. 18-23) challenges our analysis of the Pennsylvania cases (Deft.'s Br., pp. 15-22). We believe a reading of the cases will convince the Court of the correctness of our analysis.[1]

Viewing the Pennsylvania decisions with exclusive reference to their specific holdings on the narrow question of permissive rights on longitudinal beaten paths, the plaintiff purports to find that the *Falchetti* case (307 Pa. 203) is an isolated holding and hence not adequate to create an established rule. The Pennsylvania rule is broader in its scope. The rule is that in Pennsylvania a person using a well defined crossing over the tracks is a licensee to whom the railroad owes a duty of due care but that a person walking elsewhere on the general right of way devoted exclusively to the operation of trains (whether on a beaten path or not) is a trespasser to whom the railroad owes no obligation except to refrain from wilful or wanton negligence. In this broad aspect the *Falchetti* case is not an isolated holding but is consistent with and supported by the prior cases reviewed in our main brief and is consistently followed by the later cases.

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[1] We particularly call attention to plaintiff's misstatement of the *Taylor* case (Pltf.'s Br., p. 20), repeated from his brief opposing certiorari, despite our comment thereon (Deft.'s Br., p. 16).

That the broad rule above stated is not a recent departure or an isolated holding is apparent from the following quotation from *Philadelphia etc. R. R. Co.* v. *Hummell*, 44 Pa. 375 (84 Am. Dec. 457) (1863) at page 458:

> "It is time it should be understood in this state that the use of a railroad track, cutting, or embankment, is exclusive of the public everywhere, except where a way crosses it. This has more than once been said, and it must be so held, not only for the protection of property, but, what is far more important, for the preservation of personal security, and even of life. In some other countries, it is a penal offense to go upon a railroad. With us, if not that, it is a civil wrong of an aggravated nature, for it endangers, not only the trespasser, but all who are passing or transporting along the line. As long ago as 1852, it was said by Judge Gibson, with the concurrence of all the court, that 'a railway company is a purchaser, in consideration of public accommodation and convenience, of the exclusive possession of the ground paid for to the proprietors of it, and of a license to use the highest attainable rate of speed, with which neither the person nor property of another may interfere.'"

Furthermore, the rule in question is by no means confined to Pennsylvania, as shown in the discussion in *Elliott on Railroads*, Third Edition, Sections 1645, 1647, 1785, 1791, 1795.

As to the non-existence of any Federal Common Law.

Plaintiff's brief does not specifically dispute our point (Deft.'s Br., pp. 25-6) that there is no federal common law applicable to such a case as this and that the law to be ascertained is that of the state. We call attention, however, to the following statement in plaintiff's brief (p. 9):

> *"Chesapeake & Ohio R.* v. *Kuhn*, 284 U. S. 44. (Holding in negligence cases arising under Federal Employees' Liability Act 'federal common law' must be followed in preference to contrary state decisions)."

The phrase "federal common law" is a misquotation. The Court stated that in proceedings under the Federal Employer's Liability Act, "wherever brought, the rights and obligations of the parties depend upon it and applicable principles of common law as interpreted and applied in the federal courts." This, of course, is not a holding that there is a federal common law in any sense here pertinent. As in *Central Vermont Ry.* v. *White,* 238 U. S. 507 (Pltf.'s Br., p. 17), the Court merely held, as a matter of statutory interpretation, that the Federal Employer's Liability Act was presumably written and should be construed in the light of relevant federal court decisions.

As to the extent of the obligation of Federal Courts to follow State Court decisions on matters of State law.

The highest court of Pennsylvania has unequivocally stated the law to be settled in Pennsylvania that permissive rights (while they may be acquired at well defined crossings) may not be acquired along the general right of way devoted exclusively to the operation of trains and that this settled rule is based in part on the public interest in the efficient operation of railroads in Pennsylvania.

It is beyond question that the Pennsylvania rule here invoked by defendant (a) was established to a substantial extent when the accident occurred, and (b) is based to a substantial extent on local considerations. We think it is clear that the state rules which this Court has overridden in its actual holdings, including all of the cases relied upon by plaintiff, have been marked by a distinctly lesser composite degree of local establishment and local considerations.

Swift v. *Tyson,* 41 U. S. (16 Pet.) 1. Question: Is an indorsee a bona fide purchaser where the payee-indorser of a promissory note received it for a past indebtedness? Establishment: The highest court of New York had not passed on the question. Local considerations: None.

Baltimore & Ohio Rd. v. *Baugh*, 149 U. S. 368. Question: Does the assumption of risk doctrine apply to a fireman with respect to acts of the engineer-conductor as a fellow servant? Establishment: The Ohio rule in the negative was deemed established by the Ohio courts though the logic of the rule was doubted by the Ohio courts themselves. Local considerations: None.

Chicago City v. *Robbins*, 67 U. S. (2 Black) 418. Question: Is an independent contractor's failure to guard an excavation a necessary incident to construction work so as to render the owner liable for a consequent injury? Establishment: One isolated Illinois decision under more or less similar circumstances. Local considerations: None.

Gardner v. *Michigan Central Ry.*, 150 U. S. 349. Question: Is plaintiff barred under the assumption of risk doctrine with respect to a hole in a plank left by fellow servants? Establishment: Only one Michigan case seemingly in the affirmative and this Court considered that the case went on another ground. Local considerations: None.

Hough v. *Railway Co.*, 100 U. S. 213. Question: Is a railroad freed of liability under the fellow servant rule where the duty to keep machinery repaired arose on notice to the railroad of defects? Establishment: Two Texas cases cited for the affirmative were deemed by this Court as not so holding. Local considerations: None.

Lake Shore etc. Ry. v. *Prentice*, 147 U. S. 101. Question: May punitive damages be recovered from a railroad on account of wanton acts of the conductor toward a passenger without any showing that the railroad participated in the offense? Establishment: No state decisions (Indiana or Illinois) were asserted; merely a diversity of opinion among the courts of other states. Local considerations: None.

New York Central Railroad Co. v. *Lockwood*, 84 U. S. (17 Wall.) 357. Question: Is a general contract exempting a railroad from negligence with respect to drovers on stock

trains invalid as against public policy? Establishment: The asserted New York holding *(locus contractus)* in the negative rested on a slight majority decision after prior adverse holdings, and was on a *special* contract. Local considerations: None (interstate commerce involved).

Liverpool Steam Co. v. *Phenix Ins. Co.*, 129 U. S. 397. Question: May a steamship company make a valid contract exempting itself from liability for negligence in the carriage of goods? Establishment: Apparently established in New York (*locus contractus*). Local considerations: None (injury to goods nearing England).

Beutler v. *Grand Trunk Ry. Co.*, 224 U. S. 85. Question: Is the question as to who are fellow servants a question of fact for the jury? Establishment: An Illinois holding that the question might be left to the jury established no settled rule of property. Local considerations: None.

Baltimore & Ohio R. v. *Goodman*, 275 U. S. 66; *Pokora* v. *New York Central R.*, 292 U. S. 98; *Union Pacific R.* v. *McDonald*, 152 U. S. 262; *Sioux City & P. R. Co.* v. *Stout*, 84 U. S. (17 Wall.) 657. No state rule asserted or considered.

Black & White Taxicab Co. v. *Brown & Yellow Taxicab Co.*, 276 U. S. 518. Question: Is a railroad contract giving to a taxicab company exclusive privileges to enter on railroad property to solicit patronage void as tending to monopoly? Establishment: Two Kentucky cases holding the affirmative rested on general reasoning; some distinction from the instant case as to facts shown regarding monopoly. Local considerations: The matter of public policy may be regarded as appropriate in some degree for local determination; but there was no suggestion that the matter was affected by any local conditions in Kentucky.

Olcott v. *Supervisors*, 83 U. S. (16 Wall.) 678. Question: Is a state tax for railroad aid void as not being for a public use? Establishment: One Wisconsin case in the affirmative. Local considerations: No local considerations shown (but

compare *Hairston* v. *Danville & Western Ry.*, 208 U. S. 598, Deft.'s Br., p. 41, holding that what is a public use in condemning for railroad purposes is a local question).

Myrick v. *Michigan Central Ry. Co.*, 107 U. S. 102. Question: Is a railroad deemed to contract for carriage to a destination on a connecting line where it receipts for goods marked for such a destination? Establishment: Illinois cases *(locus contractus)* asserted as holding in the affirmative. Local considerations: None.

As to Plaintiff's Contributory Negligence.

Our objection to the rule of the Circuit Court of Appeals with respect to the question of contributory negligence is not, as the plaintiff seems to assume (Br., p. 32), that that court gave consideration to the cases cited by it as similar. The Circuit Court of Appeals, while deeming the plaintiff's conduct "imprudent," stated that the fact that recoveries had been allowed in the similar cases "indicates that fairminded men may hold a different view," and that this precluded taking the issue from the jury (R., pp. 396-7).

The problem of the Circuit Court of Appeals was to determine whether fairminded men could reach different conclusions as to the existence of contributory negligence in the present case. Of course the *verdicts* in the cited cases, however similar the circumstances, cannot be regarded as indicating that fairminded men might reach different conclusions as to the existence of contributory negligence since that would beg the question. The *allowances of recoveries* in those cases (by permitting the verdicts to stand) presumably indicate that the respective opinions of the particular courts were that fairminded men might reach different conclusions as to the existence of contributory negligence. But, assuming the similarity of the cases, it still remained for the Circuit Court of Appeals to decide whether the opinions were sound. We think it is obvious that the Cir-

cuit Court of Appeals took the short-cut of viewing the cited allowances of recoveries (whether sound or not) as a direct test of the range of fairminded differences.

Certainly, this is an utterly illogical test. We think it is a thoroughly erroneous and dangerous variation from the criterion stated by this Court in the cases cited by the Circuit Court of Appeals (R., p. 397).

Respectfully submitted:

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OCTOBER TERM, 1937

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HARRY J. TOMPKINS,

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

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Respondent offers its apologies for the frequent use of quotations herein. However, the use of deceiving summaries of cases and misleading quotations in petitioner's brief necessitated rebuttal by express and full quotations.

IN THE

Supreme Court of the United States

OCTOBER TERM—1937.

No. 367.

ERIE RAILROAD COMPANY (a New York Corporation),
Petitioner,

against

HARRY J. TOMPKINS,
Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

Statement of Facts.

On July 27, 1934, plaintiff, while walking toward his home (about 80 feet away) (Blue Print, Plaintiff's Exhibit I, fol. 1408), was struck by an unusual projection which "looked like a door" (fol. 141) and which was negligently permitted to project from the side of defendant's railroad train (fol. 556). The projection struck him on the right side of the head (fol. 142), as a result of which he was thrown to the

ground and suffered an amputation of his right arm by the train wheels (fol. 328). When plaintiff was struck he was at the junction of two paths (fol. 141; Opinion of the Circuit Court of Appeals, fol. 496), one of which ran parallel with defendant's track and the other crossed it diagonally (fol. 113). The two paths were four and a half feet in width at this point (fols. 569, 593). The edge of the meeting point of these paths, nearest the ties, was from two to two and a half feet from the end of the ties (fol. 130). These paths were well beaten and had been openly and notoriously used by the public for periods variously estimated from twelve to twenty years (fols. 107, 128, 323, 405, 427, 402, 429, 109, 170).

The plaintiff had walked on the parallel path many times when trains went by (fols. 173, 176). Plaintiff's witnesses had walked on the path and had observed the public walking on the path hundreds of times in the day and night while trains were passing, and had even observed persons wheeling barrows while trains were moving by the path (fols. 464, 470, 598). This parallel path was variously estimated to be at points as much as three feet from the ties (fol. 446), the plaintiff testifying it was two feet from the ties (fol. 109). However, the plaintiff and all the witnesses agreed that while walking on the parallel path a person's body would be at a distance of one to two feet from the side of a passing train[1] (fols. 185, 471, 538, 374), and it was not disputed that at the junction of the two paths, where the accident occurred, the edge of the meeting point of these two paths nearest the ties was from two to two and a half feet from the ties (fol. 130).

The aforementioned diagonal path led from Hughes Street, a stub end street, up to the parallel path, and thence across the tracks (fol. 129). The parallel path extends parallel with defendant's tracks from Rock Street to Hughes Street (a distance of 115 feet) when it meets the diagonal path (fol. 129).

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[1] The dimensions and use of the paths were testified to only by the plaintiff and his witnesses. Although petitioner produced a civil engineer who took exact measurements of the topography (fols. 959, 999), it afforded no testimony on this point.

On the night of the accident, plaintiff had alighted from an automobile at the Rock Street crossing (fol. 138) to go home.[1] His home was on Hughes Street, being the second house from the defendant's tracks (fol. 101). As he was proceeding along the parallel path in the direction of his home, he saw the defendant's train approaching (fols. 140, 141), and when he was but a few steps from the juncture of the two paths, the engine passed him[2] (fol. 141). Just as he got on the juncture[3] of the two paths and was about to step down into Hughes Street (fol. 279) he was struck by the projection (fol. 141).

There were substantial and important gaps in defendant's records produced at trial (fols. 905, 906), most of its witnesses were either impeached (fols. 760, 924-938, 1054-1058, 1126) or tended to show negligent inspection (fols. 1009, 737, 1099) of the cars in question and accordingly a jury sitting in the District Court, Southern District of New York, on the 13th day of October, 1936, awarded the plaintiff a verdict in the sum of $30,000. Upon appeal to the Circuit Court of Appeals, the judgment was unanimously affirmed with opinion (fols. 496-501).

In their petition, petitioner has attempted to attack the credibility of the plaintiff. Such questions are, of course, improperly raised at this time. Suffice it to say, however, that although defendant, at trial, tried to browbeat plaintiff into saying that he had contradicted himself in legal papers which he did not draw or understand, the plaintiff's veracity remained unscathed and the jury accepted plaintiff's testimony as truth, rejecting the testimony of defendant's employees.

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[1] Which was much the shorter way home (fol. 239; Pl's. Ex. 1, Blueprint, fol. 1408).

[2] It was pretty dark but he could see the side of the engine as it passed him (fols. 179, 180).

[3] Although one of plaintiff's witnesses testified that on the morning after the accident he told a detective of defendant who was in court, all about the accident (i.e., where plaintiff was found—fols. 382, 394), defendant produced no one in court to contradict the fact that plaintiff was on the juncture.

Introduction.

In substance, the petitioner contends:

First: That a Federal Court, in dealing with an injury to a person on a railroad's right of way, should follow a single peculiar decision of a Pennsylvania Court[1] which states that no duty of due care is owed to persons on longitudinal, as distinguished from crossing, paths on said right of way—rather than follow the rule adopted by almost every State in the Union and the Federal Courts,[2] namely, that a duty of due care is owed to persons under such circumstances.

This question is of no wide significance, since, excluding the State of Pennsylvania, Courts throughout the country have almost unanimously decided that a duty of due care is owed to persons on all types of railroad paths. It therefore appears that it is only in Pennsylvania that there is any question of the State Court rule being disregarded for a different, majority rule. Even in Pennsylvania the very decision relied on by petitioner is confined solely to longitudinal paths—as to cross-paths, Pennsylvania decisions are the same as in the other jurisdictions.[3]

Second: That the Circuit Court of Appeals applied the wrong test concerning the alleged contributory negligence of the plaintiff, although the said Court enunciated and followed the well-established rule that where reasonable men

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[1] *Falchetti* v. *Penn. R.R.*, 307 Pa. 203, 160 A. 859, which is directly contrary to other Pennsylvania decisions, as shown in Point I, subdivision C.

[2] The lower Court adopted the rule endorsed by practically every jurisdiction where the question has been presented, namely, that "when the public has made open and notorious use of a railroad right of way for a long period of time and without objection, the company owes to such persons on such permissive pathway a duty of care in the operation of its trains" (fol. 497, opinion of Circuit Court of Appeals). Cases were collected in the brief below from close to thirty jurisdictions, from several Federal Circuits and from the American Law Institute Restatement of Torts. Petitioner conceded in the Court below that the overwhelming authority was in accord with the rule stated by the Circuit Court of Appeals.

[3] See *infra*, Point I, subdivision C (2).

may differ the question of contributory negligence is for the jury.[1]

This question is of no wide significance since it concerns itself with the application of a firmly established rule to the particular facts of this case.

It thus appears that the questions presented by petitioner are not of substantial or pressing significance.

It will further appear from the following that no error was committed below:

ARGUMENT.

I. The lower Court was correct in applying the rule of the great weight of authority since

A. In cases involving questions of general law, Federal Courts will exercise their independent judgment.

This doctrine, which is now elementary, found its inception in *Swift* v. *Tyson,* 16 Peters 1; has constantly been reaffirmed by the Supreme Court and was most recently applied in the case of *Black & White Taxi Co.* v. *Brown & Yellow Taxi Co.,* 276 U. S. 518.

B. The case at bar involves a question of general law, since

1. Supreme Court decisions have established that questions of the type here presented involving railroad accidents are questions of general law.

The case of *Baltimore & Ohio R. R.* v. *Baugh,* 149 U. S. 368, involved a railroad accident which occurred in Ohio. Under a well-established line of decisions in Ohio the fellow-servant rule was inapplicable to the case. Under the decisions of Federal and other State Courts the fellow-servant rule applied. The Court held the fellow-servant rule applicable, saying (p. 370):

> "* * * unvarying has been the course of decision that the question of responsibility of a railroad

[1] The relevant portions of the opinion and the correctness of the ruling on the facts of this case are set forth in Point II.

corporation for injuries caused to or *by* its servant is one of general law.

"This is not a question of local law, to be settled by an examination merely of the decisions of the Supreme Court of Ohio, the State in which the cause of action arose, and in which the suit was brought, but rather one of general law *to be determined by a reference to all the authorities,* and a consideration of the principles underlying the relation of master and servant." (Writer's emphasis.)

The principle of the *Baugh* case has been consistently followed by the Supreme Court. In each of the following cases, involving either railroad accidents or negligence law, the local rule was disregarded and the weight of authority followed:

Chicago v. *Robbins,* 67 U. S. (2 Black) 418. (General law rule applied in preference to contrary local law rule on question of liability of land owner to passer-by for injuries sustained due to unguarded excavation on property.)

The Court held (p. 428):

"It was urged at the bar that this court, in such cases, follows the decisions of the local courts.

Where rules of property in a state are fully settled by a series of adjudications, this court adopts the decisions of the State courts. But where private rights are to be determined by the application of common law rules alone, this court, although entertaining for State tribunals the highest respect, does not feel bound by their decisions."

Gardner v. *Michigan Central Railroad,* 150 U. S. 349. (General law rule applied in preference to contrary local law rule on question of due care owed to plaintiff, injured due to hole in planking of defendant railway.)

Hough v. *Railway Co.,* 100 U. S. 213. (General law rule applied in preference to contrary local law rule

on question of contributory negligence of plaintiff in continuing to work after notice of defect in defendant's railroad equipment.)

The Court stated (p. 226):

"The question before us, in the absence of statutory regulations by the State in which the cause of action arose, depends upon principles of general law, and in their determination we are not required to follow the decisions of the State Courts."

Lake Shore etc. Ry. v. *Prentice,* 147 U. S. 101. (General law rule applied in preference to contrary local law rule on question of liability of railroad for punitive damages for acts of agent toward passenger.)

New York Central Railroad Co. v. *Lockwood,* 17 Wall. 357. (General law rule applied in preference to contrary local law rule on question of the ability of a carrier to limit its liability for injury to a passenger.)

Said the Court (p. 368):

"We should not feel satisfied without being able to place our decisions upon grounds satisfactory to ourselves and resting upon what we consider sound principles of law."

Liverpool Steam Company v. *Phenix Ins. Co.,* 129 U. S. 397. (General law rule applied in preference to contrary local law rule on question of ability of carrier to limit its liability for injury to goods.)

Defendant argued that law of New York, where contract made, controlled and was settled by recent decisions. The Court stated (p. 423, per Gray, J.):

"But on this subject as on any question depending upon mercantile law and not upon local statute or usage, it is well settled that the courts of the United States are not bound by decisions of the Courts of the State but will exercise their own judgment, EVEN WHEN THEIR JURISDICTION ATTACHES ONLY BY REASON OF THE CITIZENSHIP OF THE PARTIES IN AN ACTION AT

LAW OF WHICH THE COURTS OF THE STATE HAVE CONCURRENT JUISDICTION AND UPON A CONTRACT MADE AND TO BE PERFORMED WITHIN THE STATE." (Writer's emphasis.)

Beutler v. *Grand Trunk Railway,* 224 U. S. 85. (General law rule applied in preference to contrary local law rule on question of applicability of fellow-servant rule.)

Per Homes, J. (p. 87):

"* * * So it has been decided that in cases tried in the United States Courts we must follow our own understanding of the common law when no settled rule of property intervenes."

Central Vermont Ry. v. *White,* 238 U. S. 507. (Question of burden of proof of contributory negligence.)

Said the Court (p. 512):

"But the United States Courts have uniformly held that as a matter of general law the burden of proving contributory negligence is on the defendant. The Federal Courts have enforced the principle even in trials in States which hold that the burden is on the plaintiff." (Citing cases.)

See also:

Baltimore & Ohio R. v. *Goodman,* 275 U. S. 266. (Federal "Stop, Look & Listen" rule applied to railroad crossing accident cases although no such rule in State where accident occurred.)

Prokora v. *New York Central R.* 292 U. S. 98. (Modifying Federal "Stop, Look & Listen" rule.)

Union Pac. R. v. *McDonald,* 152 U. S. 262.

Sioux City & P. R. Co. v. *Stout,* 17 Wall. 657. (Federal doctrine on liability of railroad for injuries to infants on turntables, on theory of attractive nuisance applied in both above cases *without* consideration of State law on subject.)

The foregoing array of authorities prompted Judge Learned Hand, in *Cole* v. *Pennsylvania R. R.*, 43 Fed. (2d) 953 (involving the New York rule on the spreading of fires by railroads), to hold:

> "It is evident from the foregoing that the most recent decisions of the Supreme Court, as well as a long line of authorities in back of it, recognizes a wide field of general jurisprudence in which the Federal Courts decide cases according to their independent judgment. In this field actions involving the liability of railroads have undoubtedly been conspicuous."

The Circuit Court of Appeals and District Courts alike have universally interpreted the foregoing decisions to indicate that questions of negligence law are questions of general rather than local law upon which Federal Courts will exercise their independent judgment.

The following are representative holdings, in negligence and tort cases, to that effect, and in which a general rule of law was applied in preference to a local rule:

C. C. A.—1st:

N. Y., N. H. & H. R. v. *O'Leary*, 93 Fed. 737.
(Question of liability of employer to employee for negligence.)

C. C. A.—2nd:

New York, N. H. & H. R. Co. v. *Fruchter*, 271 Fed. 419 (rev'd 260 U. S. 141 on other grounds).
(Question of applicability of attractive nuisance doctrine to railroad turntable.)

Snare & Trieste Co. v. *Friedman*, 169 Fed. 1, cert. den. 214 U. S. 518.
(Question of applicability of attractive nuisance doctrine to railroad turntable.)

Exnir v. *Sherman*, 54 Fed. (2d) 510.
(Question of liability without fault for personal injuries due to setting off of high explosives.)

Fowler v. *Pa. R.*, 229 Fed. 373.
(Question of validity of release of defendant from liability for negligence.)

National Metal Edge Box v. *Agostini*, 258 Fed. 109.
(Question of applicability of attractive nuisance doctrine.)

C. C. A.—3rd:

Pa. R. v. *Hummel*, 167 Fed. 89.
(Question of liability of third party and employer, for negligently supplying defective equipment to plaintiff.)

C. C. A.—4th:

Hewlett v. *Schadel*, 68 Fed. (2d) 502.
(Question of liability of owner of car to guest for negligence.)

Virginia Motor Express v. *Jiminez*, 76 Fed. (2d) 694.
(Question of applicability of last clear chance doctrine in crossing accident.)

Commercial Electric v. *Greschner*, 59 Fed. (2d) 512.
(Question of applicability of doctrine of imputed negligence.)

B. & O. R. v. *Thornton*, 188 Fed. 868.
(Question of wrongful ejection of passenger by railroad.)

Snipes v. *Sou. R. R.*, 166 Fed. 1.
(Question of applicability of fellow-servant rule.)

Norfolk v. *A. P. Traction*, 174 Fed. 607.
(Question of liability of carrier for exemplary damage for acts of servant.)

C. C. A.—5th:

Jones v. *Southern Pac. R.*, 144 Fed. 973.
(Question of applicability of fellow-servant rule.)

C. C. A. 6th:

Grand Trunk Western R. Co. v. *Collins,* 65 Fed. (2d) 875.

(Question of imputing negligence of driver to guest in railroad accident case.)

Texas Co. v. *Brice,* 26 Fed. (2d) 164, cert. den. 49 Sup. Ct. 34.

(Question of agency of truck driver of defendant in personal injury action.)

Elliott v. *Fenton,* 119 Fed. 270.

(Question of negligence of servant superior to plaintiff.)

Western Union v. *Sklar,* 126 Fed. 295.

(Question of damage for delay in delivery of telegram.)

Illinois Central v. *Hart,* 176 Fed. 245.

(Question of liability of employer for negligence toward servant.)

Western Union v. *Wood,* 57 Fed. 471.

(Question of liability of telegraph company for delay in delivering messages.)

C. C. A.—7th:

Hunt v. *Hurd,* 98 Fed. 683.

(Question of applicability of fellow-servant rule.)

C. C. A.—8th:

Redfield v. *New York Central,* 83 Fed. (2d) 62.

(Question of contributory negligence of plaintiff in boarding defendant's train.)

Parramore v. *Denver etc. R.,* 5 Fed. (2d) 912, cert. den. 269 U. S. 560.

(Question of contributory negligence in death action arising out of collision of defendants with decedent's auto.)

Busch v. *Brunner,* 36 Fed. (2d) 189.

(Question of validity of provision absolving carrier from liability for injury to passenger on purely intrastate free pass.)

Western Union v. *Burris,* 179 Fed. 92.

(Question of extent of damage recoverable against telegraph company for failure or delay in delivery of message.)

C. C. A.—9th:

Western Union Tel. v. *Cook,* 61 Fed. 624.

(Liability of telegraph company for mistakes, validity of contract exempting same.)

Exception C. C. A.—1st:

Boston & Maine R. R. v. *Breslin,* 80 Fed. (2d) 749.

(Question of applicability of attractive nuisance doctrine to railroad turntable.)

(a) *There is no such doctrine, as contended by petitioner, that where a rule is well established in a State, the question is one of local law and Federal Courts must follow the rule.*

Petitioner contends that where a rule is well established in a State whose law would ordinarily be applicable under conflicts principles, Federal Courts are bound to follow the same.

It must be noted at the very outset that so far as the instant case is concerned there is no well established State rule. There is but a solitary Pennsylvania decision in point, decided in 1932, and clearly contrary to other Pennsylvania decisions.[1]

But even if the Pennsylvania decisions were well established on the issues of this case, THERE IS NO HOLDING OF THE SUPREME COURT STANDING FOR SUCH A DOCTRINE AS PROPOUNDED BY PETITIONER. Petitioner itself concedes that it

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[1] *Falchetti* v. *Penn. R. R.,* 307 Pa. 203, 160 A. 859, analyzed in subdivision C of this Point.

arrives at the rule through implication. This is necessarily so, for all of the cases cited by petitioner on this point were cases where the Federal Court *refused* to follow State Court rulings,[1] with the exception of the *Bucher* case and the *Hartford Insurance* case, both of which involved construction of State Statutes.[2] The cases cited could not, therefore, stand for the proposition that State decisions will be followed, where a rule is well established.

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[1] Cases cited by petitioner are as follows:

Swift v. *Tyson*, 16 Peters 1 (p. 21 of petitioner's brief). General law applied in preference to contrary local rulings on question of negotiable instruments.

Black & White Taxicab Co. v. *Brown & Yellow Taxi Co.*, 276 U. S. 518 (p. 23 of petitioner's brief). General law applied in preference to contrary local rulings on question of right to give exclusive soliciting privileges on railroad property.

Carpenter v. *Providence Washington Ins. Co.*, 16 Peters 495 (p. 23 of petitioner's brief). Construction of insurance policy deemed to be a question of general law.

Lane v. *Vick*, 3 How. 464 (p. 23 of petitioner's brief). Construction of will held to be question of general law and local decision disregarded.

Chicago v. *Robbins*, 67 U. S. 418 (p. 23 of petitioner's brief). Negligence of landowner in Chicago held to be a question of general law and local decisions disregarded.

Yates v. *Milwaukee*, 10 Wall. 497 (p. 23 of petitioner's brief). Holding that question of what constitutes a dedication of land to public use is a question of general law; local decision ignored and contrary general rule applied.

New York Central R.R. v. *Lockwood*, 17 Wall. 357 (p. 23 of petitioner's brief). Ability of carrier to limit its liability for injury to passenger held a question of general law.

Burgess v. *Seligman*, 107 U. S. 20 (p. 24 of petitioner's brief). Two local decisions squarely in point on question of liability of pledgee of corporate stock for debts of corporation, disregarded and general law applied.

Kuhn v. *Fairmont Coal Co.*, 215 U. S. 349 (p. 24 of petitioner's brief). Local decision disregarded and general law applied on question of implied obligation to support surface in lease of subsurface mining rights.

Snare & Triest Co. v. *Friedman*, 169 Fed. 1, cert. den. 214 U. S. 518 (p. 25 of petitioner's brief). Federal rule in turntable case applied in preference to State decisions where accident occurred.

[2] *Bucher* v. *Cheshire Rd. Co.*, 125 U. S. 555 (p. 26 of petitioner's brief). Involved local interpretation of purely local statute prohibiting traveling on Sunday and clearly, therefore, not within the *Swift* v. *Tyson* doctrine.

Hartford Ins. Co. v. *Chicago etc. Ry. Co.*, 175 U. S. 91. Local statute here stated that a railroad could not exempt itself from liability for negligence. Local decision interpreting the statute held that the statute was not to be interpreted to mean that railroad could not do so on leases of its own property, such as involved in this case. Held: "Under such circumstances, that decision [State decision] being upon a question of statutory and local law was rightly followed by the Circuit Court" (p. 108).

(b) *The doctrine is that the subject-matter, not the degree to which State decisions are settled, determines whether a question is general or local in nature.*

Petitioner's theory crumples under the weight of square Supreme Court holdings directly contrary to the theory.

In *Baltimore & Ohio R. R.* v. *Baugh,* 149 U. S. 368, the Ohio rule was so well established that even the highest Court of Ohio felt that the rule would "doubtless be accepted as authoritative," although they disagreed with its wisdom. Yet the Federal Court disregarded the Ohio rulings and followed the majority holdings, stating that the *subject-matter* was one on which the general or common law would be applied.[1]

The latest pronouncement of the Supreme Court on this subject, *Black & White Taxi Co.* v. *Brown & Yellow Taxi Co.,* 276 U. S. 518, belies the theory advanced by petitioner. There, although it had been settled for thirty-five years in Kentucky that a railroad had no authority to grant exclusive soliciting privileges at its stations to Taxi Companies, the Kentucky rule was disregarded and the weight of authority to the effect that such licenses were valid, was followed. (The license and place of performance were in Kentucky.) The Court stated that the *subject-matter* involved was one on which Federal Courts were not bound by State decision.[2]

In the case of *Central Vermont Ry.* v. *White,* 238 U. S. 507, the Supreme Court again refused to follow a long established State ruling that the burden of contributory negligence was upon the plaintiff even though it considered the question one of substance.[3] In the following cases clear and unequivocal rulings by State Courts which would have governed under principles of conflicts were ignored in favor of majority rulings. In none of them does the degree to which State law is settled concern the Court. The essential determinative factor is the SUBJECT-MATTER involved:

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1 Relevant quotation may be found at page 5.
2 Relevant quotation may be found at page 15.
3 Relevant quotation may be found at page 8.

Chicago v. *Robbins*, 67 U. S. (2 Black) 418. (Rule on liability in negligence of owner of land for acts of independent contractor.)

N. Y. C. R. R. v. *Lockwood*, 17 Wall. 357. (Rule on ability of railroad to contract itself free of liability for negligence.)

Myrick v. *Michigan Central R. R. Co.*, 107 U. S. 102. (Rule on liability of a railroad for safe delivery beyond its own line.)

Olcott v. *The Supervisors*, 16 Wall 678. (Rule on power of a county to tax in aid of construction of a railroad.)

Beutler v. *Grand Trunk Ry.*, 224 U. S. 85. (Fellow-servant rule.)

The statement in petitioner's brief (p. 27) that "Even a single decision, if 'clear and unequivocal' and constituting a 'definitive holding' should be recognized as controlling," citing *Hawks* v. *Hamill*, 288 U. S. 52, is very misleading. *Hawks* v. *Hamill* involved a State decision interpreting the STATE CONSTITUTION and this Court merely stated (p. 58):

> "If the single decision interpreting *a constitution* or a *statute* is clear and unequivocal submission to its holding has developed in these days to a practice * * *." (Writer's emphasis).

2. Questions of the type here presented, involving railroad accidents, are general rather than local in nature.

Petitioner contends that the instant case is distinguishable from the numerous Supreme Court cases cited in this brief, on the ground that there is here involved a question "local in its nature."

The holding of *Black & White Taxi Co.* v. *Brown & Yellow Taxi Co.*, 276 U. S. 518, furnishes a ready answer (p. 529):

> "There is no question concerning *title to land.* No provision of *State statute* or *constitution* and *no ancient* or *fixed local usage is involved.* For the dis-

> covery of common law principles applicable in any case investigation is not limited to the decisions of the Courts of the State in which the certiorari arose." (Writer's emphasis.)

The holding of *Olcott* v. *The Supervisors*, 16 Wall 678, is equally appropriate (p. 689):

> "It is undoubtedly true in general that this Court does follow the decisions of the highest court of the states respecting local questions *peculiar to themselves*, or respecting the construction of their own constitution and laws. But it must be kept in mind that it is only decisions on local questions, those which are peculiar to the several states, or adjudications upon the meaning of the constitution or statutes of a state, which the federal courts adopt as rules for their own judgments." (Writer's emphasis.)

Swift v. *Tyson*, 16 Peters 1, the progenitor of the rule, likewise advances a conclusive reply (p. 18):

> "In all the various cases, which have hitherto come before us for decision, this Court has uniformly supposed, that the true interpretation of the 34th Section limited its application to State laws strictly local, that is to say to the positive statutes of the State, and the construction thereof, adopted by the local Tribunals, and to rights and titles to things, having a permanent locality, such as the rights and titles to real estate, and other matters immovable and intraterritorial in their nature and character. It never has been supposed by us, that the Section did apply, or was designed to apply, to questions of a more general nature, not at all dependent upon local statutes or local usages of a fixed and permanent operation, as for example, to the construction of ordinary contracts or other written instruments, and especially to questions of general commercial law * * *."

There is not involved here any "title to land," and "ancient or fixed local usage," "State statutes" or "Constitution."

Nor is there involved here a question, "peculiar to" the State of Pennsylvania. This Court will judicially notice that railroads extend into every State of the Union, and the same

problems of railroad accidents and injuries to persons on beaten paths exist throughout the land. One has but to consult the numberless cases dealing with such accidents which are reported in every jurisdiction, in order to see the national scope of the problems involved.

The same practical reason which had some influence in the decision of *Baltimore & Ohio R. R.* v. *Baugh*, 149 U. S. 368, is present here. Here, as in the *Baugh* case, we have a railroad extending over many State lines. The employee there involved, like the pedestrian here involved, was located exclusively in Ohio.[1] The Court said:

> "As it (the railroad) passes from State to State must the rights, obligations and duties subsisting between it and its employees change at every State line."

With equal appropriateness it may be stated here, must the rights, obligations and duties subsisting between the railroad and pedestrians change at every State line? If the facts of *Chicago* v. *Robbins*, 67 U. S. (2 Black) 418, which involved the liability of a landowner for negligence toward a passerby on a street in Chicago were held by the Supreme Court to present a question of general law, certainly the instant case may be said to be an *a fortiori* case.[2]

The petitioner concedes (p. 11, petitioner's brief) that the issue of contributory negligence presents a question of "gen-

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[1] He worked in and out of the Town of Bellaire, Ohio.

[2] The contention of petitioner (p. 29 of petitioner's brief) that the instant case is closely analogous to *Detroit* v. *Osborne*, 135 U. S. 492, is clearly belied by the following quotation. After showing that Michigan statutes, as interpreted by State Court decisions, exempted the defendant municipality from liability to plaintiff for defective sidewalk, the Court said (p. 498):

"The question is not new in this court. In the case of Clairbourne County v. Brooks, 111 U. S. 400, 410, it was held that, 'When the settled decisions of the highest court of a state have determined the extent and character of the powers which its political and municipal organizations may possess, the decisions are authoritative upon the courts of the United States'; and in the opinion it was observed: 'It is undoubtedly a question of local policy with each state, what shall be the extent and character of the powers which its various political and municipal organizations shall possess; and the settled decisions of its highest courts on this subject will be regarded as authoritative by the courts of the United States, for it is a question that relates to the internal constitution of the body public of the State.'

"What was there decided in reference to the powers is equally true as to the liabilities of a municipal corporation."

eral law." To be consistent, certainly, the negligence of the defendant at the same time and place must also be considered a question of general law.

Dictates of logic compel a choice of the beaten path rule followed throughout the country, in preference to the solitary decision of the State Court. Wherever the question has arisen, tribunals of the land prompted by motives of humanity have created a duty on the part of railroads to use due care toward persons who are likely to be upon beaten paths on their right of way. Certainly it is within the province of a railroad company to protest such user and discontinue the practice if it so desires.

C. The solitary Pennsylvania decision upon which petitioner relies is of doubtful applicability to the case at bar.

1. Said decision is clearly contrary to other decisions in Pennsylvania.

The case relied on by petitioner, *Falchetti* v. *Penn. R. R.*, 307 Pa. 203, 160 A. 859, allegedly stands for the proposition that a railroad owes no duty of due care to a person on a well beaten path parallel to "a railroad's tracks and on its right of way, as distinguished from a permissive crossing over them."

Decisions in Pennsylvania have uniformly held that a duty of care *is* owed to persons on both longitudinal and crossing paths. The following are longitudinal path cases:

Taylor v. *Del. etc. Canal Co.*, 113 Pa. 162, 8 A. 43. Plaintiff injured while on a beaten path which "was used, so far as the testimony shows, by persons not for the purpose of crossing directly across the tracks to reach a point, but for the purpose of going along the track itself, within the right of way of the railroad" (p. 164). Held: "Under the allowance of this permissive way, therefore, the defendant company was bound to use reasonable care" (p. 169). Judgment for defendant reversed.

Slamovitz v. *Penn. R. R.*, 266 Pa. 63, 109 A. 544. Plaintiff injured while walking on a "generally used and well beaten path located between the track and the before mentioned concrete wall" (p. 65). Held: Duty of "close lookout" required of defendant. Judgment for plaintiff affirmed.

Kremposky v. *Mt. Jessup Coal Co.*, 266 Pa. 568, 109 A. 766. Plaintiff injured on a trestle for coal cars on defendant's private property. "A double track railroad occupied the center of the bridge, on each side of which was a plank walk four or five feet in width. * * * For many years prior to the accident people, both adults and children, had been accustomed to use the walks daily as a short cut" (p. 571). Held: The walks had become permissive ways. Judgment for plaintiff affirmed. "It is the duty of the owner of premises to exercise reasonable care to avoid inflicting injury upon those using a permissive way thereon" (p. 572).

Francis v. *Balt. & O. R. R. Co.*, 247 Pa. 429, 93 A. 490. Discussing certain testimony, as to the admission of which defendant claimed error, the Court said: "This testimony was direct and positive and, if believed, was entirely sufficient to establish not only the fact of the existence of a path *along* and *upon* the ties of the railroad at the point where the accident occurred, but the further fact of its frequent and continuous use by the public for the period above mentioned" (two months) (p. 429). Held: Judgment for plaintiff affirmed. "When the railroad company knew or should have known that part of the tracks through its yard was being used by the public in the way shown by the testimony, except as it interfered and prevented such use, a duty at once attached to exercise a degree of care in operating its cars thereon corresponding to the increased risk" (p. 429).

Kay v. *Penn. R. R.*, 65 Pa. 269, 3 Am. Rep. 628. "* * * along the tracks where the accident happened a well-worn footpath was plainly visible" (p. 272). Plaintiff was on this path when struck by one of defendant's trains. Held: Nonsuit reversed. A duty existed to use reasonable care toward those on the pathway.

Petitioner concedes that Pennsylvania decisions require a duty of due care toward persons on *cross-paths* (see cases, p. 18, of petitioner's brief).

The cases cited by petitioner on page 17 of its brief are set forth in such a manner as to make it appear that they support the *Falchetti* case. *The cases have absolutely nothing to do with the duty of due care owed to persons on beaten paths:*

Tiers v. *Penn. R. R.*, 292 Pa. 522, 141 A. 487. Plaintiff injured while crossing railroad, at a place where no path existed. The Court stated, in reversing a verdict for the plaintiff (p. 527); "If the evidence established a definite permissive point of crossing and while traversing such path plaintiff was injured a recovery might be had. That was the situation presented to the Court in *Steele* v. *Lake Shore* Ry. Co., 238 Pa. 295, 86 A. 201, relied on by appellee. There the regular walk was obstructed and plaintiff followed a well defined beaten way along * * * and over the tracks at a point beyond * * * but no such facts appear here * * * There is no evidence that there was any defined passageway at or near the place mentioned." A different ruling, said the Court, would render "most difficult, if not impracticable a proper operation of trains for the convenience of the public." It is the last quotation which petitioner set forth in its brief.

Gray v. *Penn. R. R.*, 293 Pa. 28, 141 A. 621. Plaintiff injured while proceeding along defendant's tracks. Held: "They did not establish that there was a well-defined path, but their testimony was that people walked wherever they pleased on the tracks" (p. 31). Judgment for defendant affirmed.

Conn v. *Penn. R. R.*, 288 Pa. 494, 136 A. 779. Plaintiff, infant, was injured while walking under a bridge and parallel to defendant's tracks. Plaintiff relied on the existence of a beaten path under the bridge, saying that it was used frequently by other boys. Held: No beaten path was established. Page 502: "A permissive way is a license to pass over the property of another; it may be either express or implied, but must, however, be restricted to a well-defined location and especially in the case of an implied public permission must be frequently, notoriously and continuously used by the public, to raise the inference of acquiescence on

the part of the landowner in such use." Page 508: "The testimony does not show that there was ever any regularity or continuity in the trips of the boys under the bridge." Judgment for plaintiff reversed.

Kolich v. *Mononghahela Ry. Co.*, 303 Pa. 463, 154 A. 705. Plaintiff injured while crossing defendant's tracks. The case rests solely on the contributory negligence of plaintiff. The Court held: "The jury's finding that this was a permissive crossing * * * had ample evidence to support it, as had also their finding that defendant was guilty of negligence in giving no warning of the approach of its train thereto. This leaves open only the question of plaintiff's contributory negligence, which we think was clearly established" (p. 467). Judgment for plaintiff reversed.

Koontz v. *B. & O. R. R.*, 309 Pa. 122, 163 A. 212. Plaintiff injured while crawling under one of defendant's freight trains. Held: No duty of care was owed since, "Instead of showing the existence of a permissive crossing, the evidence showed that no such crossing existed" (p. 127). Judgment for plaintiff reversed.

Lindsay v. *Glen Alden Coal Co.*, 318 Pa. 133, 177 A. 751. In this case plaintiff's intestate after ascending a 12-foot wall of concrete was climbing up a railroad embankment when killed by a live wire. After holding the deceased guilty of contributory negligence, the Court stated: "The evidence that people ran up the concrete and then walked at one place or another over the culm bank to the top is not of such a character as to establish a right of way or to put an increased burden on defendant in the circumstances disclosed by the evidence. See Suthold v. Ry. Co., 47 Pa. Sup. 137; Conn v. R. R., 288 Pa. 494; Falchetti v. Pa. R. R., 307 Pa. 203. Decedent's heedlessness resulting in his death" (p. 137). Judgment for defendant affirmed. (This case is cited by petitioner as approving the *Falchetti* case. See page 17, petitioner's brief.)

It is important to note that the Justice who wrote the opinion in the *Falchetti* case was apparently under a misapprehension as to the law of Pennsylvania, for it is stated as follows:

> great, if anything should happen to be projecting from the train; but we cannot say that this particular danger was likely, in view of the testimony of the train checkers that seldom, if ever, had they known a door to swing open."

Nor can it be urged in earnest that the time or attention of this Court should be devoted to a detailed analysis of the facts in order to see whether this plaintiff was guilty of contributory negligence in this single case at bar. Voluminous testimony was presented relating to the widening of the paths at the point of the accident (the parallel path widened out to about 4½ feet at this point, fols. 569, 592, 593), the user of the paths by the public at night (the paths were used at all hours of the day and night WHILE TRAINS WERE PASSING, fols. 462-470); the frequent use of the paths by the plaintiff (fols. 173, 176); the distances of the paths from the tracks (the edges of the two paths were about 2 to 2½ feet from the ties at the place where the accident occurred, fol. 130). Two lower Courts and a jury have decided in the light of all these facts, that the plaintiff was not guilty of contributory negligence.

CONCLUSION.

It is respectfully submitted that there are no questions here presented warranting certiorari and that petitioner's application for a writ should, therefore, be denied.

ALEXANDER L. STROUSE,
WILLIAM WALSH,
BERNARD G. NEMEROFF.

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IN THE

Supreme Court of the United States

October Term, 1937.

No. 367.

ERIE RAILROAD COMPANY (a New York corporation),
Petitioner,

against

HARRY J. TOMPKINS,
Respondent.

On Writ of Certiorari to the United States Circuit Court of Appeals for the Second Circuit.

BRIEF ON BEHALF OF RESPONDENT, HARRY J. TOMPKINS.

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The Hecla Press, 225 Varick Street, N. Y. C. Tel. WAlker 5-1430.

> "* * * as the Conn and Kolich cases show an alleged permissive way parallel to the plaintiff's tracks and on its right of way, as distinguished from a crossing over them, is not recognized in this State."

The *Conn* and *Kolich* cases are above set forth and clearly stand for no such proposition. In the *Conn* case, no beaten path was established.[1] In the *Kolich* case, the accident happened on a cross-path and the sole issue was plaintiff's contributory negligence.[2]

The authority of the *Falchetti* case is further weakened since peculiar facts were there involved. In that case plaintiff was struck by the overhang of an engine. At the time he was struck he was on a path parallel to defendant's railroad track at a sharp curve. The Court pointed out that even in the exercise of due care the engineer could not tell whether his overhang would hit anyone on the path. Said the Court (p. 206):

> "It is difficult, if not impossible, for the engineer of an approaching train on the track nearest the path to know, until it is too late to avoid an accident, whether or not he can operate his engine without striking a pedestrian, if one should be on the path at the place of this regrettable accident. At that point it was but a few inches from the track, so that the cylinder of the engine, on account of the curve, not only projected over the rail further than would have been the case on a straight track, but also by means hereof, tended to hide from the view of the engineer those who were on the path."

2. The facts of the case at bar do not come within the purview of the Pennsylvania decision.

The record discloses and the Circuit Court of Appeals affirmed the fact that at the time plaintiff was struck he was at the junction of two paths (fols. 141, 276; Circuit Court of Appeals Opinion, fol. 496), one crossing the track and one running parallel thereto (fols. 111-114; Circuit Court of Ap-

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[1] See *supra*, page 20.

[2] See *supra*, page 21.

peals, fol. 496). It will be noted that the Pennsylvania decision on which petitioner relies states only that no duty of due care is owed to persons on longitudinal paths but specifically confines the decision to such paths as distinguished from cross-paths.[1] Under the law of Pennsylvania, it is clearly established that a duty of due care *is* owed to persons on cross-paths (*Lodge* v. *Pitts etc. R. Co.*, 243 Pa. 10, 89 A. 790; *Steele* v. *Lake Shore etc. R. Co.*, 238 Pa. 295, 86 A. 201; see footnote, p. 18 of petitioner's brief). It would, therefore, appear that the Pennsylvania decision of *Falchetti* v. *Pa. R. R.* is inapplicable to the facts of the case at bar[2] since at the time plaintiff was struck he was on the cross-path. At trial, defendant claimed no duty of due care whatsoever was owed to plaintiff, asserting that no permissive pathway doctrine could be applied to this case (defendant's objection, fols. 123-124; defendant's motion, fol. 640; defendant's assignment of error, fol. 1453).

On appeal, defendant, in order to sustain its position at trial contended that the cross-path had nothing to do with the case at bar. Now defendant concedes that it was a "disputed" question of fact[3] as to whether plaintiff was on the cross-path. This Court will refuse to entertain certiorari where disputed questions of fact are involved.

D. There is no conflict among the Circuits upon the question here involved.

Petitioner contends there is a conflict in the Circuits on the question involved. Since clear Supreme Court holdings are determinative of the issues involved, any conflict in the Circuits necessarily becomes irrelevant. The cases cited in subdivision B of this point clearly indicate, however, that whenever the point has been squarely raised (except in the First Circuit) the Circuits have unanimously followed Supreme Court rulings.[4] IN NONE OF THE CASES OUTSIDE OF THE FIRST

[1] Relevant quotation from said decision, *Falchetti* v. *Penn. R. R.*, 307 Pa. 203, 160 A. 859, may be found at page 22.

[2] Defendant's assignment of errors, fol. 1453.

[3] Petitioner's brief, page 6.

[4] See *supra*, pages 9, 10, 11, 12.

CIRCUIT CITED BY PETITIONER WAS THE QUESTION OF GENERAL-LOCAL LAW RAISED EXCEPT in *Roberts* v. *Tennessee Coal etc. Co.*, 255 Fed. 469, and in *McGuire* v. *Sherwin-Williams Co.*, 87 Fed. (2d) 112. In the latter case, although the Court stated that in the case at bar it (p. 114) "was not bound to follow the decisions of the highest court of the state," "no impelling reason" existed for disregarding the state decisions since there was a square split of authority on the point involved.

It is interesting to note that the case upon which petitioner mainly relies as creating such a diversity among the Circuits as to warrant certiorari, *B. & M. R. R.* v. *Breslin*, 80 Fed. (2d) 749 (C. C. A., 1st), was a case where certiorari was denied by the Supreme Court on March 2, 1936 (297 U. S. 715), EVEN THOUGH AT THE TIME OF ITS RENDITION THERE WAS A DECISION IN ANOTHER CIRCUIT DIRECTLY CONTRARY TO IT (*Snare & Triest Co.* v. *Friedman*, 169 Fed. 1, cert. den. 214 U. S. 518—involving the same doctrine, attractive nuisance aspect of railroad turntable, and holding general rather than local law applicable).

II. The lower Court properly applied the rule that where reasonable men may differ contributory negligence is a question for the jury.

In spite of a feeble protest by petitioner, it cannot be denied that the lower Courts followed the simple and well-established rule that where reasonable men may differ the question of contributory negligence is for the jury.

The Circuit Court of Appeals opinion reads as follows (fol. 498):

> "Nor can we say, in view of the cases, that the possibility of being hit by some unusual projection from the side of a train is one that ought to be foreseen and enough to charge the plaintiff with contributory negligence as a matter of law, if he remains within reach of it (citing several cases). To us it would seem imprudent to walk or even stand in the dark within a foot of a train moving at 10 miles an hour; but the fact that recoveries have been allowed under

closely similar circumstances in the cases above cited *indicates that fair minded men may hold a different view. This is enough to preclude taking the issue from the jury*" (citing cases). (Writer's emphasis.)

The italicized portions of the above quotation clearly indicates that the Circuit Court of Appeals applied the correct test as recognized by this Court and conceded by petitioner.[1]

Petitioner raises the objection that the lower Court should not have looked to the decisions of other Courts in order to determine whether this plaintiff was guilty of contributory negligence. Unless we are to assume that other verdicts were not rendered by fair-minded men and passed upon by fair-minded jurists, and unless we are to abolish the entire system of precedent upon which our judicial foundation is constructed, the petitioner's argument is untenable.

The American Law Institute Restatement of the Law of Torts, at Section 285, Topic 3, recognizes that the conduct of a plaintiff may be defined by a decision, or series of decisions, in closely similar cases and that such decisions are controlling.

Nor can any alleged difference in inches (if any there appears from the extended testimony) between the instant case and those cited by the Circuit Court of Appeals[2] be said to be of such moment as to warrant certiorari.

It is to be noted, of course, that the Circuit Court of Appeals did not rely solely on the cases cited therein in reaching its determination of the instant case, although a reading of petitioner's brief would lead one to so believe. The Circuit Court of Appeals opinion reads (fol. 498):

"In the case at bar, the opportunity to avoid danger was easily available and the danger was very

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1 Pages 33, 34 of petitioner's brief.

2 The cases cited were cases in which plaintiff was so close to the edge of a station platform as to be thrown down by the suction of a swiftly passing train (*Munroe* v. *Penn. R. Co.*, 85 N. J. L. 688, 90 A. 254); where plaintiff was about two or three feet from a moving train (*Texas & Pacific* v. *Greene*, 291 S. W. 929, aff'd 299 S. W. 639); where plaintiff was about 2½ to 3 feet from a moving train (*Chesapeake & O. R.* v. *Davis*, 22 Ky. L. Rep. 748, 58 S. W. 698); where plaintiff was three or four feet from a moving train (*Pruitt* v. *Sou. R.*, 167 N. C. 246, 83 S. E. 350); where plaintiff was within five feet from a moving train (*Schultz* v. *Erie R.*, 46 Fed. [2] 485).

IN THE

Supreme Court of the United States

OCTOBER TERM, 1937.

ERIE RAILROAD COMPANY (a New York corporation),
Petitioner,
against
HARRY J. TOMPKINS,
Respondent.
No. 367.

On Writ of Certiorari to the United States Circuit Court of Appeals for the Second Circuit.

BRIEF ON BEHALF OF RESPONDENT, HARRY J. TOMPKINS.

Statement of Facts.

On July 27, 1934, respondent, twenty-seven years of age, suffered the loss of his entire right arm (p. 86). The accident which forms the basis of respondent's cause of action occurred just as he was at the junction of two footpaths (pp. 30, 71, 72, 78; Opinion, Circuit Court of Appeals, p. 497) which had been used for decades by his townspeople and himself (pp. 21-27, 83, 107, 114). One of these paths crossed defendant's railroad tracks diagonally and the other ran near the side of defendant's tracks and parallel therewith (pp. 21-27). One night, when returning from his

mother-in-law's, he took the parallel path to the junction, thence intending to proceed along the diagonal path away from the tracks (pp. 29-30). This was the shortest and most direct route to his home (pp. 60, 353, Blue Print, Plaintiff's Exhibit 1), which was the second house from the tracks (p. 19). On the night in question, as he was walking along the parallel path, a train approached from the opposite direction (p. 30). Hundreds of his townsfolk, as well as the plaintiff, were in the custom of walking along this path at all hours of the day and night while trains were passing (pp. 40, 125-127). Many of them had even wheeled barrows of coal along the path while trains were passing (p. 127). He, therefore, had no reason to anticipate danger (pp. 40, 41).

He was but a few steps from the junction of the two paths (p. 30) when he saw the side of the engine as it passed him (p. 42). He continued to walk and took about four steps while parallel to the train (p. 71). This brought him to the junction of the two paths (p. 71). At that moment as the engine and a few cars of the train had passed him (p. 50) and at that time and place just as he had reached the junction (p. 30) there suddenly loomed up in front of him a large black object protruding from the side of the train out over the footpath (pp. 30, 78). In the brief moment before plaintiff was thrown violently backward and under the cars, he was able to judge that he was hit by "a black object that looked like a door" (p. 30). It was later developed at trial that the fourth car on the seal-check list produced at the trial by defendant (Defendant's Exhibit E, p. 374) was a refrigerator car of the type of which the doors swing outward (pp. 290, 239).

As to the alleged negligence of the plaintiff:

One fact must be regarded as vitally significant. Respondent was struck by a door protruding from the train (p. 30). He was not struck by the side of the train (p. 78). The Trial Judge charged the jury, at defendant's request, that

if they believed "plaintiff was not struck by the door of a freight car * * *" (p. 350), then its verdict must be for the defendant. By virtue of the verdict for the plaintiff (p. 352) it is to be assumed that the plaintiff was struck by the door of a car, a danger he had no reason to "anticipate" (p. 397, Opinion, Circuit Court of Appeals). Therefore, the mass of mathematical data compiled in appellant's brief (Appellant's Brief, p. 5) designed to demonstrate plaintiff's proximity to the side of the train becomes irrelevant.

Concerning the defendant's mathematical data:

It is to be noted that appellant has entirely ignored the testimony in stating the facts. Plaintiff testified that he was struck at the junction of the two paths (p. 30); that at this point the two paths widen out to about 4 feet and the pathway space was 2 to 2½ feet from the ties (pp. 26, 157). Under elementary appellate procedure, not only are these facts to be considered as true, but the most favorable inferences that can be drawn in favor of plaintiff must be assumed. Instead, however, appellant has given the measurements of the path at points other than where plaintiff was struck and based invalid arguments thereon (Appellant's Brief, p. 5). It has entirely omitted to mention the measurements at the point where plaintiff was struck.

These distances were only the estimates of plaintiff's witnesses and were not offered as exact measurements. They should be blended with the information that this well-defined path (p. 21) was safely used at all hours while trains were passing.

The defendant produced exact measurements by experts as to the width of the railroad ties (p. 218), the engine (p. 220) and the cars of the train in question (p. 216). The defendant also produced a surveyor, who gave accurate measurements as to the slope and character of the terrain immediately adjacent to the footpath and tracks (pp. 269-276; Defendant's Exhibit I, p. 379). He admitted the existence of paths (p. 279). However, the defendant offered

no testimony, accurate or estimated, as to the path, its distance from the tracks or the distance between a pedestrian on the path and a passing train. The fair conclusion is that the estimated distances of plaintiff's witnesses were more favorable to the defendant than revealed by the accurate investigation of defendant.

The appellant in its brief (Appellant's Brief, p. 6) attempts to attack plaintiff's credibility, which is not at all one of the issues here involved. The plaintiff testified he was struck by "a black object that looked like a door" (p. 30) which he knew projected from the side of defendant's train (p. 51). He was not willing to swear positively that the projection was a door, although he believed it to be one (p. 73); and he told this to Drs. Murphy and Fleming when he was in the hospital (pp. 77, 78), immediately after the accident, before he had seen a lawyer and before he had signed the bill of discovery (p. 79). This bill of discovery was prepared by plaintiff's attorney in order to obtain information for a bill of particulars sought by defendant and in the main coincided with plaintiff's testimony at the trial.

Defendant's witnesses, on the other hand, clearly attempted to conceal the true order of the cars on the train. The seal-check list (Defendant's Exhibit E, p. 374) read differently from the train list (Defendant's Exhibit F, p. 375); the wheel-book (Plaintiff's Exhibit 7, p. 359) read differently from the former two. Two cars, which were not even mentioned in these three lists, were shown to have blood stains on their wheels after arrival at their destination (p. 255). An alleged inspection of the train in question, before it departed, was attempted to be proved in the case of one witness by a report which he conceded he made up after he knew of the accident (p. 259) and in the case of another witness by independent recollection of the inspection which occurred back in 1934, although he had kept no record (p. 268). It appears that on defendant's railroad the car inspectors never tested the seals on doors to see that the doors were securely locked (pp. 305, 304, 258, 267). Two other witnesses were produced by defendant who were under no

duty to make any inspection (pp. 281-297, 311). Their only duty was to prepare the order and description of the train (pp. 281, 311). These witnesses only inspected one side of the train, conveniently the side from which the projection protruded (pp. 283, 296, 297). Their testimony regarding the alleged safety of the train in every respect on the night in question in 1934 can hardly, therefore, be called credible.

An inspection of the train was made after the accident and records were kept by defendant (pp. 253, 254). In spite of this fact, defendant offered as its sole witness to this latter inspection a person who had inspected only part of the train (pp. 252-254). Defendant concealed the number of cars inspected by him as well as the condition of the balance of the train (pp. 252-254). It is a fair inference that said concealed information was detrimental to appellant's cause.

ARGUMENT.

I. The lower Court was correct in applying the rule of the great weight of authority since

A. In cases involving questions of general law, Federal Courts will exercise their independent judgment.

This doctrine, which is now elementary, found its inception in *Swift* v. *Tyson,* 16 Peters 1; has constantly been reaffirmed by the Supreme Court and was most recently applied in the case of *Black & White Taxi Co.* v. *Brown & Yellow Taxi Co.,* 276 U. S. 518.

B. Decisions of this Court, as well as logic and reason, have established that questions of the type here presented, involving railroad accidents, are questions of general law, upon which independent judgment may be exercised by Federal Courts.

Decisions of this Court involving railroad accidents or closely analogous questions in which it has been held that

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With equal appropriateness it may be stated here, must the rights, obligations and duties subsisting between the railroad and pedestrian change at every State line?

The contention of appellant (Appellant's Brief, p. 43) that the instant case is closely analogous to *Detroit* v. *Osborne,* 135 U. S. 492, is clearly belied by the following quotation. That case dealt with a problem of municipal government. After showing that Michigan *statutes,* as interpreted by State Court decisions, exempted the defendant municipality from liability to plaintiff for defective sidewalk, the Court said (p. 498):

> "The question is not new in this court. In the case of Clairbourne County v. Brooks, 111 U. S. 400, 410, it was held that, 'When the settled decisions of the highest court of a state have determined the extent and character of the powers which its political and municipal organizations may possess, the decisions are authoritative upon the courts of the United States'; and in the opinion it was observed: 'It is undoubtedly a question of local policy with each state, what shall be the extent and character of the powers which its various political and municipal organizations shall possess; and the settled decisions of its highest courts on this subject will be regarded as authoritative by the courts of the United States, for it is a question that relates to the internal constitution of the body public of the State.'
>
> What was there decided in reference to the powers is equally true as to the liabilities of a municipal corporation."

The Courts below, in rejecting the single, illogical decision of the Pennsylvania Court, chose to follow the rule not only supported by authority, but also by logic and justice. In the briefs below, decisions were compiled by respondent, illustrating that in practically every jurisdiction where the question has arisen the Courts have decided that persons upon *all* types of beaten pathways on railroad property are owed a duty of care by said railroads. (Decisions were collected from close to thirty jurisdictions and the great weight of authority was conceded by appellant to support the rule.)

This overwhelming authority bases its position upon the cogent reason that since persons are likely to be upon such beaten paths at the time of passage of railroad trains, injuries to such persons are likely to result unless the railroad is operated with due regard for the safety of the individuals so situated, and this is true whether the path crosses the railroad tracks or runs parallel thereto (*Adams* v. *Southern R.*, 84 Fed. 596, 600). It is to be further noted that this rule is not oppressive on railroads since it is confined to well beaten and well defined pathways (*Adams* v. *Southern R.*, 84 Fed. 596, 600),* and it certainly is within the province of railroads to protest such user and discontinue the same if it so desires. Surely it should be in the power of a Federal Court, if it so chooses, to adopt the more logical and humane rule of the majority opinions. That the Federal and State Courts operate under separate and distinct sovereignty is a fundamental concept in our government. The ultimate aim of both is justice, and where a State Court has gone astray, to compel Federal adhesion to such injustice is not only to destroy the judicial function but to make a fetich of legalistic conflicts principles.

Let the Federal Courts exercise their own judgment on all principles of general law, except where local rules of property, involving such things as transfer of title upon which people have relied for generations, or except where peculiar local customs, such as, e. g., prohibition of riding on Sunday, have grown up. How much clearer does the "local law" exception to the rule become when analyzed in this light, an exception designed only to prevent the upsetting of vested local rights and undue interference with provincial customs and ways, by Federal Courts.

Authority, logic and reason, therefore, impelled Federal Courts in this case to exercise their independent judgment.

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*See also *Tiers* v. *Pa. R. Co.*, 292 Pa. 522, 141 Atl. 487; *Conn.* v. *Pa. R. Co.*, 288 Pa. 494, 136 Atl. 779; quotations contained *infra* (p. 22).

C. There is no such doctrine as contended by appellant, that where a rule is well established in a State, the question is one of local law and Federal Courts must follow the rule even though the rule might otherwise be regarded as one of general law.

Appellant contends (Point III, subd. "B," Appellant's Brief) that where a rule is well established in a State, whose law would ordinarily be applicable under conflicts principles, Federal Courts are bound to follow the same, even though the rule might be regarded as one of general law.

It must be noted at the outset that so far as the instant case is concerned there is no well established State rule. There is but a solitary Pennsylvania decision in point, decided in 1932, and clearly contrary to other Pennsylvania decisions.*

But even if Pennsylvania decisions were well established on the issues, petitioner's contention is based upon a superstructure of authority so tenuous that it cannot even be called *"obiter dicta."* It is at most *inference* from *"obiter dicta."* This Court has clearly defined those situations under which it will follow State law and those under which it will use its independent judgment in following the weight of authority. Quotations from this Court on the subject have been previously set forth in full, *supra,* at pages 9 to 11; and see also pages 25, 26. From none of these quotations does it appear that this Court will follow a State rule, even if the rule is well established, where the case involves an issue of general law.

Appellant's brief entirely disregards the aforesaid clear enunciations by this Court and delving into hidden crevices of its judicial opinions draws inference upon inference concluding with what "we think" this Court means.

Such conduct on appellant's part would indeed be justifiable, if it could by some means show that this Court in spite of its clear words as above enunciated *has acted* in a way inconsistent with its clear statements above set forth.

**Falchetti* v. *Penn. R. R.,* 307 Pa. 203, 160 Atl. 859, analyzed in Point II of this brief.

This, however, appellant is unable to do. Every case cited by appellant on this point was a case where the Court held that State Court rulings were rightfully disregarded.* Those decisions cannot possibly demonstrate that this Court *has acted* in such a way as to provide a basis for appellant's contention that there is a rule that State decisions in questions of general law will be followed, where a State rule is well established.

The single case cited by appellant in which this Court did follow the local law was *Bucher* v. *Cheshire Road Co.*, 125 U. S. 55, which involved the local interpretation of a

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*Cases cited by petitioner are as follows:

Swift v. *Tyson*, 16 Peters 1 (p. 24 of Appellant's Brief). General law applied in preference to contrary local rulings on question of negtoiable instruments.

Black & White Taxicab Co. v. *Brown & Yellow Taxi Co.*, 276 U. S. 518 (p. 34 of Appellant's Brief). General law applied in preference to contrary local rulings on question of right to give exclusive soliciting privileges on railroad property.

Carpenter v. *Providence Washington Ins. Co.*, 16 Peters 495 (p. 29 of Appellant's Brief). Construction of insurance policy deemed to be a question of general law.

Lane v. *Vick*, 3 How. 464 (p. 30 of Appellant's Brief). Construction of will held to be question of general law and local decision disregarded.

Chicago v. *Robbins*, 67 U. S. 418 (p. 30 of Appellant's Brief). Negligence of landowner in Chicago held to be a question of general law and local decisions disregarded.

Yates v. *Milwaukee*, 10 Wall. 497 (p. 31 of Appellant's Brief). Holding that question of what constitutes a dedication of land to public use is a question of general law; local decision ignored and contrary general rule applied.

New York Central R. R. v. *Lockwood*, 17 Wall. 357 (p. 31 of Appellant's Brief). Ability of carrier to limit its liability for injury to passenger held a question of general law.

Burgess v. *Seligman*, 107 U. S. 20 (p. 31 of Appellant's Brief). Two local decisions squarely in point on question of liability of pledgee of corporate stock for debts of corporation disregarded and general law applied.

Baltimore & Ohio R. v. *Baugh*, 149 U. S. 368 (p. 32 of Appellant's Brief). General law applied in preference to contrary local holdings on question of fellow-servant rule.

Barber v. *Pittsburgh etc. R.*, 166 U. S. 83 (p. 33 of Appellant's Brief). General law applied in preference to contrary State decision on question of construction of a devise of land within said State.

Kuhn v. *Fairmont Coal Co.*, 215 U. S. 349 (p. 33 of Appellant's Brief). Local decision disregarded and general law applied on question of implied obligation to support surface in lease of subsurface mining rights.

Snare & Triest Co. v. *Friedman*, 169 Fed. 1; cert. den., 214 U. S. 518 (p. 36 of Appellant's Brief). Federal rule in turntable case applied in preference to decisions of State where accident occurred.

purely local statute prohibitng traveling on Sunday. The case, therefore, clearly involved a local issue and could be no possible authority to the effect that Federal Courts will follow well established State decisions on questions of general law.

It appears that this Court has acted in just such situations as those wherein appellant contends the State Courts will be followed. But whereas appellant is unable to offer a single decision in its favor, the following *holdings* are set forth to demonstrate that *even* where State decisions are well established the Federal Court may rightfully disregard State rulings, if the subject-matter is general rather than local in nature.

In *Baltimore & Ohio R. R.* v. *Baugh*, 149 U. S. 368, the Ohio rule was so well established that the highest Court of Ohio stated that, even though they disagreed with its wisdom, the rule would "doubtless be accepted as authoritative." Yet the Federal Court disregarded the Ohio rulings and followed the weight of authority throughout the country, stating that the *subject-matter* was one on which the general or common law would be applied.*

The latest pronouncement of the Supreme Court on this subject, *Black & White Taxi Co.* v. *Brown & Yellow Taxi Co.*, 276 U. S. 518, also belies the theory advanced by petitioner. There, although it had been settled for thirty-five years in Kentucky that a railroad had no authority to grant exclusive soliciting privileges at its stations to taxi companies, the Kentucky rule was disregarded and the weight of authority to the effect that such licenses were valid was followed. (The license and place of performance were in Kentucky.) The Court stated that the *subject-matter* involved was one on which Federal Courts were not bound by State decision.†

The assertion in appellant's brief (p. 35) that "the question at issue had not been foreclosed or settled by previous

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* Relevant quotation may be found at page 6.
† Relevant quotation may be found at page 9.

Kentucky adjudications" is clearly untrue, for as Mr. Justice Holmes remarked in his dissenting opinion (p. 535):

> "This is a question concerning the lawful use of land in Kentucky by a corporation chartered by Kentucky. The policy of Kentucky with regard to it has been settled in Kentucky for more than 35 years."

In the case of *Central Vermont Ry.* v. *White*, 238 U. S. 507, the Supreme Court again refused to follow a long established State ruling that the burden of proving contributory negligence was upon the plaintiff even though it considered the question one of substance.* In the following cases clear and unequivocal rulings by State Courts which would have governed under principles of conflicts were ignored in favor of majority rulings. In none of them does the degree to which State law is settled concern the Court. The essential determinative factor is that a question of general law was involved:

Chicago v. *Robbins*, 67 U. S. (2 Black) 418. (Rule on liability in negligence of owner of land for acts of independent contractor.)

N. Y. C. R. R. v. *Lockwood*, 17 Wall. 357. (Rule on ability of railroad to contract itself free of liability for negligence.)

Myrick v. *Michigan Central R. R. Co.*, 107 U. S. 102. (Rule on liability of a railroad for safe delivery beyond its own line.)

Olcott v. *The Supervisors*, 16 Wall. 678. (Rule on power of a county to tax in aid of construction of a railroad.)

Beutler v. *Grand Trunk Ry.*, 224 U. S. 85. (Fellow-servant rule.)

Appellant itself points out that in the case of *Swift* v. *Tyson*, 16 Peters 1, this Court would not even have gone into the question of whether Federal Courts may disregard

* Relevant quotation may be found at pages 6, 7.

Federal Courts may exercise their independent judgment are as follows:

Baltimore & Ohio R. R. v. *Baugh,* 149 U. S. 368.

That case involved a railroad accident which occurred in Ohio. Under a well-established line of decisions in Ohio the fellow-servant rule was inapplicable to the case. Under the decisions of Federal and other State Courts the fellow-servant rule applied. This Court held the fellow-servant rule applicable, saying (p. 370):

> "* * * unvarying has been the course of decision that the question of responsibility of a railroad corporation for injuries caused to or by its servant is one of general law.
>
> "This is not a question of local law, to be settled by an examination merely of the decisions of the Supreme Court of Ohio, the State in which the cause of action arose, and in which the suit was brought, but rather one of general law to be determined by a reference to all the authorities, and a consideration of the principles underlying the relation of master and servant."

Chicago v. *Robbins,* 67 U. S. (2 Black) 418. (General law rule applied in preference to contrary local law rule on question of liability of land owner to a passerby for injuries sustained due to unguarded excavation on property.)

This Court held (p. 428):

> "It was urged at the bar that this court, in such cases, follows the decisions of the local courts.
>
> "Where rules of property in a state are fully settled by a series of adjudications, this court adopts the decisions of the State courts. But where private rights are to be determined by the application of common law rules alone, this court, although entertaining for State tribunals the highest respect, does not feel bound by their decisions."

Central Vermont Ry. v. *White,* 238 U. S. 507. (Question of burden of proof of contributory negligence.)

Said this Court (p. 512):

> "But the United States Courts have uniformly held that as a matter of general law the burden of proving contributory negligence is on the defendant. The Federal Courts have enforced the principle even in trials in States which hold that the burden is on the plaintiff." (Citing cases.)
>
> *Gardner* v. *Michigan Central Railroad,* 150 U. S. 349. (General law rule applied in preference to contrary local law rule on question of due care owed to plaintiff, injured due to hole in planking of defendant railway.)
>
> *Hough* v. *Railway Co.,* 100 U. S. 213. (General law rule applied in preference to contrary local law rule on question of contributory negligence of plaintiff in continuing to work after notice of defect in defendant's railroad equipment.)

This Court held (p. 226):

> "The question before us, in the absence of statutory regulations by the State in which the cause of action arose, depends upon principles of general law, and in their determination we are not required to follow the decisions of the State Courts."
>
> *Lake Shore etc. Ry.* v. *Prentice,* 147 U. S. 101. (General law rule applied in preference to contrary local law rule on question of liability of railroad for punitive damages for acts of agent toward passenger.)
>
> *New York Central Railroad Co.* v. *Lockwood,* 17 Wall. 357. (General law rule applied in preference to contrary local law rule on question of the ability of a carrier to limit its liability for injury to a passenger.)

This Court stated (p. 368):

> "We should not feel satisfied without being able to place our decision upon grounds satisfactory to ourselves and resting upon what we consider sound principles of law."

Liverpool Steam Co. v. *Phenix Ins. Co.*, 129 U. S. 397. (General law rule applied in preference to contrary local law rule on question of ability of carrier to limit its liability for injury to goods.)

Defendant there argued that the law of New York, where contract made, controlled and was settled by recent decisions. This Court stated (p. 423), per Gray, J.:

> "But on this subject as on any question depending upon mercantile law and not upon local statute or usage, it is well settled that the courts of the United States are not bound by decisions of the Courts of the State and will exercise their own judgment, even when their jurisdiction attaches only by reason of the citizenship of the parties in an action at law of which the Courts of the State have concurrent jurisdiction and upon a contract made and to be performed within the State."

Beutler v. *Grand Trunk Railway*, 224 U. S. 85. (General law rule applied in preference to contrary local law rule on question of applicability of fellow-servant rule.)

This Court said (p. 87):

> "* * * So it has been decided that in cases tried in the United States Courts that we must follow our own understanding of the common law when no settled rule of property intervenes."

See also:

Baltimore & Ohio R. v. *Goodman*, 275 U. S. 266. (Federal "Stop, Look & Listen" rule applied to railroad crossing accident cases although no such rule in State where accident occurred.)

Prokora v. *New York Central R.*, 292 U. S. 98. (Modifying Federal "Stop, Look & Listen" rule.)

Union Pac. R. v. *McDonald*, 152 U. S. 262.

Sioux City & P. R. Co. v. *Stout*, 17 Wall. 657. (Federal doctrine on liability of railroad for injuries to infant on turntables, on theory of attractive nuisance applied in both above cases without consideration of State law on subject.)

Chesapeake & Ohio R. v. *Kuhn*, 284 U. S. 44. (Holding in negligence cases arising under Federal Employees' Liability Act "federal common law" must be followed in preference to contrary state decisions.)

The foregoing array of authorities prompted Judge Learned Hand, in *Cole* v. *Pennsylvania R. R.*, 43 Fed. (2d) 953 (involving the New York rule on the spreading of fires by railroads), to hold:

> "It is evident from the foregoing that the most recent decisions of the Supreme Court, as well as a long line of authorities in back of it, recognize a wide field of general jurisprudence in which the Federal Courts decide cases according to their independent judgment. In this field actions involving the liability of railroads have undoubtedly been conspicuous."

The above citations have been confined to railroad accidents or closely analogous situations. In addition it should be noted that this Court on numerous occasions has clearly enunciated the sort of questions which it deems to be questions of local and those which it deems to be questions of general law. A reading of the following quotations will reveal that the legal issue here involved is not of a local nature.

Said this Court in *Black & White Taxi Co.* v. *Brown & Yellow Taxi Co.*, 276 U. S. 518, in holding that the issue there involved was not one of a local nature (p. 529):

> "There is no question concerning *title to land*. No provision of *State statute* or *constitution* and *no*

> *ancient* or *fixed local usage is involved.* For the discovery of common law principles applicable to any case investigation is not limited to the decisions of the Courts of the State in which the certiorari arose." (Writer's emphasis.)

The holding of *Olcott* v. *The Supervisors,* 16 Wall. 678, is equally appropriate (p. 689):

> "It is undoubtedly true in general that this Court does follow the decisions of the highest court of the states respecting local questions *peculiar to themselves,* or respecting the construction of their own constitution and laws. But it must be kept in mind that it is only decisions on local questions, those which are peculiar to the several states, or adjudications upon the meaning of the constitution or statutes of a state, which the federal courts adopt as rules for their own judgments." (Writer's emphasis.)

Swift v. *Tyson,* 16 Peters 1, the progenitor of the rule, likewise contains a clear statement of the rule (p. 18):

> "In all the various cases, which have hitherto come before us for decision, this Court has uniformly supposed, that the true interpretation of the 34th Section limited its application to State laws strictly local, that is to say to the positive statutes of the State, and the construction thereof, adopted by the local Tribunals, and to rights and titles to things, having a permanent locality, such as the rights and titles to real estate, and other matters immovable and intraterritorial in their nature and character. It never has been supposed by us, that the Section did apply, or was designed to apply, to questions of a more general nature, not at all dependent upon local statutes or local usages of a fixed and permanent operation, as for example, to the construction of ordinary contracts or other written instruments, and especially to questions of general commercial law * * *."

In *Bucher* v. *Cheshire Rd. Co.*, 125 U. S. 555, the Court specifically addressed itself to what is meant by local law (p. 582):

> (After stating that Federal Courts will follow State Courts in questions which concern the Constitution and laws of the State, the Court continued):
> "It is also well settled that where a course of decisions, whether founded upon statute or not, have become rules of property as laid down by the highest courts of the State, by which is meant those rules governing the descent, transfer or sale of property and the rules which affect the title or possession thereto, they are to be treated as the laws of that State by the Federal Courts."

See also, quotations, *infra*, pp. 25, 26.

There is not involved here any "title to land," "ancient or fixed local usage," "State statutes" or "Constitution."

Nor is there involved here a question, "peculiar to" the State of Pennsylvania. This Court will judicially notice that railroads extend into every State of the Union, and the same problems of railroad accidents and injuries to persons on beaten paths exist throughout the land. One has but to consult the numberless cases dealing with such accidents which are reported in every jurisdiction to see the national scope of the problem involved.

In the case at bar, not only were the Courts below supported by the great weight of authority above recited, but every dictate of practicality, logic and reason compelled the application of the general law rule.

The same practical reason which influenced the decision of *Baltimore & Ohio R. R.* v. *Baugh*, 149 U. S. 368, is present here. Here, as in the *Baugh* case, we have a railroad extending over many State lines. The employee there involved, like the pedestrian here involved, was located exclusively in one State.* The Court said:

> "As it (the railroad) passes from State to State must the rights, obligations and duties subsisting between it and its employees change at every State line."

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* He worked in and out of the town of Bellaire, Ohio.

In *Barber* v. *Pittsburgh* (166 U. S. 83) this Court refused to follow a single State decision relating to the construction of a certain form of devise in a will. Said this Court (p. 99):

> "When the construction of certain words in deeds or wills of real estate has become a settled rule of property in a State, that construction is to be followed by the Courts of the United States in determining the title to land within the State, whether between the same or other parties (citing cases).
>
> "But a single decision of the highest court of a State upon the construction of the words of a particular devise is not conclusive evidence of the law of the State in a case in a court of the United States, involving the construction of the same or like words, between other parties or a case between the same parties or their privies unless presented under such circumstances as to be an adjudication of their rights (citing cases)."

Likewise in accord is *Lane* v. *Vick,* 44 U. S. (3 How.) 464. In that case this Court refused to follow the decision of the highest Court of the State of Mississippi on the construction of a devise in a particular will, stating at page 476:

> "It is insisted that the construction of this will has been conclusively settled by the Supreme Court of Mississippi in the case of Vick, et al. v. The Mayor, etc., of Vicksburg, 1 How. 379,"

and after indicating that that case was not *res adjudicata,* the opinion continues:

> "With the greatest respect, it may be proper to say this Court does not follow the State Courts in their construction of a will or any other instrument as they do in the construction of statutes. Where * * * the construction of a will had been settled by the highest Courts of the State and had long been acquiesced in as a rule of property this Court would follow it, because it had become a rule of property."

See also *Yates* v. *Milwaukee,* 77 U. S. (10 Wall.) 497.

A case very close to the case at bar was *Pease* v. *Peck*, 18 How. 595. In that case a late Michigan decision was contrary to a series of earlier Michigan decisions on the question of a Statute of Limitations. In refusing to follow the later decision this Court stated (p. 599):

> "Where the decisions of a State Court are not consistent we do not feel bound to follow the last if it is contrary to our own convictions—and much more is this the case, where, after a long course of consistent decisions, some new light suddenly springs up, or an excited public opinion has elicited new doctrines, subversive of former safe precedents."

In addition to the aforementioned authorities this Court has explicitly stated that where the law of a State is not settled, even though the Federal Court would otherwise be under a duty to follow local law, under such circumstances they may use their independent judgment.

In view of the obvious reliance in the *Falchetti* case on previous precedent in Pennsylvania, and the total failure of said precedent to support the holding in the *Falchetti* case, the law of Pennsylvania can hardly be said to be "settled" against the respondent on the subject here involved.

In *Burgess* v. *Seligman*, 107 U. S. 20, where this Court declared that it was stating its "views with distinction in order to obviate any misapprehensions that may arise from language and expressions used in previous decisions" (p. 34), the following appears (p. 33):

> "Since the ordinary administration of the law is carried on by the State Courts, it necessarily happens that by the course of their decisions certain rules are established which become rules of property and action in the State and have all the effect of law and which it would be wrong to disturb. This is especially true with regard to the law of real estate and the construction of State Constitutions and Statutes. Such established rules are always regarded by the Federal Courts, no less than by the State Courts themselves as authoritative declarations of what the law is. But where the law has not been settled, it is the right and

> duty of the Federal Courts to exercise their own judgment, as they *also always* do in reference to the doctrines of commercial law and general jurisprudence." (Writer's emphasis.)

Again, this Court reaffirmed the rule in *Kuhn* v. *Fairmount Coal Co.*, 215 U. S. 349 (p. 360):

> "We take it then that it is no longer to be questioned that Federal Courts in determining cases before them are to be guided by the following rules: 1. When administering state laws and determining rights accruing under the laws, the jurisdiction of the Federal Courts is an independent one, not subordinate to but coordinate and concurrent with the jurisdiction of the State Courts. 2. Where, *before the rights of the parties have accrued,* certain rules relating to real estate have been so established by State decisions as to become rules of property and action in the State, these rules are accepted by the Federal Court as authoritative decisions of the Law of the State. 3. *But where the State law has not been then settled,* it is not only the right but the duty of the Federal Court to exercise its independent judgment as it also always does when the case before it depends on the doctrines of commercial law and general jurisprudence * * *." (Writer's emphasis.)

See also:

> *Swift* v. *Tyson,* 16 Peters 1;
> *Hines, Trustee,* v. *Martin,* 268 U. S. 458, 465.

It, therefore, appears that, even if a question of local law were here involved, the Federal Court in the case at bar was perfectly justified in exercising its independent judgment, in view of the unsettled condition of the Pennsylvania law and the fact that appellant relies upon a solitary Pennsylvania decision clearly contrary to the weight of Pennsylvania decisions.

Aside from such consideration, however, even if the Federal Court were to attempt to apply the *Falchetti* case to the case at bar, the latter case is inapplicable to the facts

involved herein. It is uncontested in the case at bar that plaintiff was at the intersection of a diagonal and a longitudinal pathway when he was struck. This was affirmed by the Circuit Court of Appeals and by defendant's own counsel (p. 79; Plaintiff's Exhibit 1, p. 353; Opinion, Circuit Court of Appeals, p. 394). Defendant offered no witness to dispute the fact, although an agent of the railroad (in court) had been shown the exact spot where plaintiff was found (pp. 116, 100). The assertion in appellant's brief (p. 13) that the Trial Court "treated the accident as a longitudinal pathway accident" is incorrect. The Trial Court after its charge to the jury refused as already "covered" plaintiff's request to charge (p. 341) that if the jury believed plaintiff was on the junction of the two paths at the time of the accident, the defendant owed him a duty of reasonable care.

A complete reading of the Court's charge in the light of this later ruling reveals that the Trial Court did recognize plaintiff's presence on the diagonal path at the time of the accident. The *Falchetti* case only states that no duty of due care is owed to persons upon longitudinal pathways and clearly does not attempt to reverse or modify the previous well-established Pennsylvania ruling that a duty of due care is owed to persons on cross paths.* Appellant contends that the cross-path doctrine is inapplicable to the facts of the case at bar because the plaintiff was not using the aforementioned diagonal path for the purpose of crossing the railroad track. However, a reading of the Pennsylvania decisions herein set forth† indicates that the liability of a railroad for injury to persons upon cross paths is based not upon the manner of use of such paths but rather upon the likelihood of persons being present in the vicinity of the railroad track where such paths may be situated.

Thus, reviewing the picture as a whole, appellant relies upon a single State decision, recently decided, clearly contrary to the weight of other decisions within the same State

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* See quotation *supra*, page 21.
† See quotations at pages 19, 20.

and itself of highly dubious applicability to the facts of the case at bar. Under such circumstances, even if a local issue had been here involved, the Federal Court was justified in exercising its independent judgment.

III. The lower Courts properly held that it was a question for the jury as to whether plaintiff was under a duty to foresee the danger of an unusual and undesigned projection protruding from the side of defendant's train.

The appellant asserts (Appellant's Brief, p. 46) the Courts below erred "in refusing to hold plaintiff contributorily negligent as a matter of law; and in particular the Circuit Court of Appeals erred in applying an unsound test in reaching this conclusion."

An appraisal of the plaintiff's conduct in the light of all the circumstances at the time of the accident will reveal that the Courts below correctly concluded that the issue of plaintiff's negligence was properly submitted to the jury.

The plaintiff, a young man twenty-seven years of age, having resided in the vicinity of the accident all his life, and within 80 feet of it (Blueprint, Plaintiff's Exhibit 1, p. 353) for the three years prior to the accident (p. 19), knowing that he had safely traversed this path at all hours of the day and night while trains were passing (p. 40); knowing that hundreds of his townsfolk had also safely traversed this path at all hours of the day and night while trains were passing (pp. 125-127); knowing that the terrain immediately adjacent to the said path contained many ruts and was uneven and was on an incline (p. 40); and knowing that the foot path on which he was proceeding was solid and well beaten (p. 39), was walking upon this path on the night of the accident.

He took three or four steps while parallel to the train (p. 71). During this time the engine and several cars of the train safely passed him (p. 50). He kept his body a suffi-

cient distance away from the side of the train so that the overhang of the cylinder head of the engine and all other normal and designed projections from the engine and train safely cleared him by a distance which he estimated in his testimony to be from 1 to 2 feet (p. 44).

When he had reached the junction of the parallel path and the diagonal path, a point (p. 30) where the paths widened out to about 4½ feet (p. 26), and were distant about 2 to 2½ feet from the ends of the ties (pp. 26, 157), a "black object, which looked like a door" suddenly loomed up in front of him (p. 30), struck him on the right side of his head, throwing him backward so that his right arm was severed by the wheels of the passing train.

The undisputed testimony that the plaintiff as well as hundreds of his townsfolk had safely used the paths in question innumerable times prior to the accident, at all hours of the day and night, while trains were passing, is ample proof of the plaintiff's exercise of due care.

In the case of *Harris etc.* v. *Uebelhoer,* 75 N. Y. 169, the Court stated at page 174:

> "So far as prior safe and successful experiments go to negative a negligent frame of mind, in making another, in similar circumstances, it must be conceded that here were sufficient. It cannot be said, as matter of law, that it was negligent and careless, lacking of prudent forethought, to attempt that which others often undertook with safety, and which the party herself had often herself achieved, without harm and without imminent peril."

Furthermore, as pointed out in Points I and II, appellant was under a duty to exercise due care toward the respondent, therefore the latter could proceed on the assumption that appellant would conduct itself in such a manner that he had no reason to believe a freight car door would be open.

Appellant goes to great length to show that in the numerous cases cited by the Circuit Court of Appeals there might have been a difference in inches in the closeness of the plain-

State decisions if it had not first assumed that the question has "been fully settled in New York" (*Swift* v. *Tyson,* 16 Peters 1, at p. 27, footnote 1).

The statement in petitioner's brief (p. 45) that "Even a single decision, if 'clear and unequivocal' and constituting a 'definitive holding' should be recognized as controlling," citing *Hawks* v. *Hamill,* 288 U. S. 52, is very misleading. *Hawks* v. *Hamill* involved a State decision interpreting the State Constitution and this Court merely stated (p. 58):

> "If the single decision interpreting a *constitution* or a *statute* is clear and unequivocal submission to its holding has developed in these days to a practice * * *." (Writer's emphasis.)*

Swift v. *Tyson,* 16 Peters 1, itself stated that a State decision interpreting State statute must be followed by Federal Courts (see quotation *supra,* p. 10).

It thus appears that even though a State rule is well established, Federal Courts are not bound to follow the same where a question of general law is involved.

II. Even if a question of local law were here involved, the same result must be reached since appellant relies upon a solitary Pennsylvania decision, clearly contrary to the weight of Pennsylvania decisions, and of doubtful applicability to the facts of the case at bar.

The case relied on by petitioner (Petitioner's Brief, p. 15), *Falchetti* v. *Penn. R. R.,* 307 Pa. 203, 160 A. 859 (1932) allegedly stands for the proposition that a railroad owes no duty of due care to a person on a well-beaten path parallel to "a railroad's tracks and on its right of way, as distinguished from a permissive crossing over them."

Decisions in Pennsylvania have uniformly held that a duty of care *is* owed to persons on longitudinal paths.

*It will be noted that this doctrine applies only to interpretation of constitutions and State statutes and not to other local matters (see Point II, *infra*).

Many of these cases have been generally characterized in appellant's brief as not so holding. To avoid any misconstruction, the facts and holdings are, therefore, stated in the quoted language of the Pennsylvania courts.

Slamovitz v. *Penn. R. R.*, 266 Pa. 63, 109 A. 544. Plaintiff injured while walking on a "generally used and well beaten path located between the track and the before mentioned concrete wall" (p. 65). "The testimony further showed that, in going into the Kennedy Plant, people generally walked either in the middle of the railroad tracks or on this narrow packed pathway" (p. 66). Held: Duty of "close lookout" required of defendant. Judgment for plaintiff affirmed.

Kremposky v. *Mt. Jessup Coal Co.*, 266 Pa. 568, 109 A. 766. Plaintiff injured on a trestle for coal cars on defendant's private property. "A double track railroad occupied the center of the bridge, on each side of which was a plank walk four or five feet in width. * * * For many years prior to the accident people, both adults and children, had been accustomed to use the walks daily as a short cut" (p. 571). Held: The walks had become permissive ways. Judgment for plaintiff affirmed. "It is the duty of the owner of premises to exercise reasonable care to avoid inflicting injury upon those using a permissive way thereon" (p. 572).

Francis v. *Balt. & O. R. R. Co.*, 247 Pa. 429, 93 A. 490. Discussing certain testimony, as to the admission of which defendant claimed error, the Court said: "This testimony was direct and positive and, if believed, was entirely sufficient to establish not only the fact of the existence of a path *along* and *upon* the ties of the railroad at the point where the accident occurred, but the further fact of its frequent and continuous use by the public for the period above mentioned" (two months) (p. 429). Held: Judgment for plaintiff affirmed. "When the railroad company knew or should have known that part of the tracks through its yard was being used by the public in the way shown by the testimony, except as it interfered and prevented such use, a duty at once attached to exercise a degree of care in

operating its cars thereon corresponding to the increased risk" (p. 429). (This case is characterized in appellant's brief as "essentially a crossing accident"; Appellant's Brief, p. 17.)

Taylor v. *Del. etc. Canal Co.*, 113 Pa. 162, 8 A. 43. Plaintiff injured while on a beaten path which "was used, so far as the testimony shows, by persons not for the purpose of crossing directly across the tracks to reach a point, but for the purpose of going along the track itself, within the right of way of the railroad" (p. 164). This statement of fact is taken from the opinion of the Court of Common Pleas, which statement the Court on appeal adopted as its own (p. 164). Held: "Under the allowance of this permissive way, therefore, the defendant company was bound to use reasonable care" (p. 169). Judgment for defendant reversed.

Kay v. *Penn R. R.*, 65 Pa. 269, 3 Am. Rep. 628. "* * * *along the tracks where the accident happened* a well-worn footpath was plainly visible" (p. 272). Plaintiff was on this path when struck by one of defendant's trains. Held: Nonsuit reversed. The Court said:

> "If, therefore, an owner of property has been accustomed to allow to others a permissive use of it, such as tends to produce a confident belief that the use will not be objected to, and therefore to act on the belief accordingly, he must be held to exercise his rights in view of the circumstances so as not to mislead others to their injury, without a proper warning of his intent to recall his permission" (p. 273). "* * *. The presumption of a clear track would not reasonably arise if the circumstances were such as have been stated" (p. 274).

It can be seen that the above cases do not rest upon whether paths are longitudinal or crossings but rather on the likelihood of persons being on beaten paths regardless of their route. A reading of the cases dealing with cross-paths, in Pennsylvania, will reveal the same deduction. *Steele* v. *Lake Shore & M. S. Ry. Co.*, 238 Pa. 295, 86 Atl. 201; *Lodge* v. *Pitts etc. R. Co.*, 243 Pa. 10, 89 Atl. 780; see also *Counizzari*

v. *Phil etc. Ry. Co.*, 248 Pa. 474, 94 Atl. 134, and *O'Leary* v. *Pitts etc. R. Co.*, 248 Pa. 4, 93 Atl. 771. Appellant concedes that a duty of due care is owed to persons on cross-paths in Pennsylvania (Appellant's Brief, pp. 15-21). The Pennsylvania Courts in the above cases reached this conclusion without drawing a distinction between cross-paths and parallel paths.

Whereas, in its brief in support of its petition for certiorari and also before the Circuit Court of Appeals, appellant gave the impression that the *Falchetti* case was based upon a long line of authority, this position is now abandoned by appellant, who is unable to cite any holding supporting the *Falchetti* case. This is extremely significant, for the Court in deciding the *Falchetti* case stated that it did so by virtue of precedent. Said the Court (*Falchetti* v. *Penn. R. R.*, 307 Pa. 203, 206):

> "* * * And moreover as the Conn. and Kolich cases show, an alleged permissive way parallel with defendant's tracks, and on its right of way, as distinguished from a permissive crossing over them is not recognized in this State * * *.
>
> "We do not deem it necessary to review the authorities cited by either litigant as showing, or tending to show, that a long continued use of a well defined path on the right of way of the defendant railroad company may or may not be considered as evidencing a permission to continue to use it. So far, if at all, as they tend to sustain, the right to continue such use, they must be considered as overruled by the Conn. and Kolich cases."

But appellant now concedes that the only support that can be found in the *Kolich* case, *supra*, is *dictum* (Appellant's Brief, p. 20), and makes no attempt to show that the holding in the *Conn* case in any way supports the *Falchetti* case, although the *Conn* case is commented on at length in appellant's brief (pp. 18, 19). For the convenience of this Court the *Conn* and *Kolich* cases are briefly set forth:

Conn v. *Penn. R. R.*, 288 Pa. 494, 136 A. 779. Plaintiff, infant, was injured while walking under a bridge and parallel to defendant's tracks. Plaintiff relied on the existence of a beaten path under the bridge, saying that it was used frequently by other boys. Held: *No beaten path was established.* Page 502: "A permissive way is a license to pass over the property of another; it may be either express or implied, but must, however, be restricted to a well-defined location and especially in the case of an implied public permission must be frequently, notoriously and continuously used by the public, to raise the inference of acquiescence on the part of the landowner in such use." Page 508: "The testimony does not show that there was ever any regularity or continuity in the trips of the boys under the bridge." Judgment for plaintiff reversed.

Kolich v. *Monongahela Ry. Co.*, 303 Pa. 463, 154 A. 705. Plaintiff injured while crossing defendant's tracks. The case rests solely on the contributory negligence of plaintiff. The Court held: "The jury's finding that this was a permissive crossing * * * had ample evidence to support it, as had also their finding that defendant was guilty of negligence in giving no warning of the approach of its train thereto. This leaves open only the question of plaintiff's contributory negligence, which we think was clearly established" (p. 467). Judgment for plaintiff reversed.

It thus appears that the *Conn* and *Kolich* cases, the sole authority cited by the Pennsylvania Court in the *Falchetti* case to support its holding, have nothing whatever to do with the proposition of law propounded by the Court in that case. In the *Conn* case no beaten path was proved. In the *Kolich* case the accident happened on a cross-path and the sole issue was plaintiff's contributory negligence.

The same may be said of *Tiers* v. *Penn. R. R.*, 292 Pa. 522, 141 A. 487, the single case cited by appellant as "leading up to the Falchetti decision" (Appellant's Brief, p. 19). That was a crossing case, plaintiff was injured at a crossing, and, of course, in the quotation set forth in appellant's brief, page 19, the Court talks only about crossings. The facts

and holding are as follows: Plaintiff, injured while crossing railroad, at a place where no path existed. The Court stated, in reversing a verdict for the plaintiff (p. 527): "If the evidence established a definite permissive point of crossing and while traversing such path plaintiff was injured a recovery might be had. That was the situation presented to the Court in Steele v. Lake Shore Ry. Co., 238 Pa. 295, 86 A. 201, relied on by appellee. There the regular walk was obstructed and plaintiff followed a well defined beaten way along * * * and over the tracks at a point beyond * * * but no such facts appear here * * * There is no evidence that there was any defined passageway at or near the place mentioned."

Nor has any case ever followed the *Falchetti* case. Appellant concedes, page 20, that no subsequent decision in Pennsylvania has involved a longitudinal pathway. It can be seen from a reading of appellant's brief that three later cases cited therein involving use of railroad property did not even involve beaten paths. *Koontz* v. *B. & O. R. Co.*, 309 Pa. 122, 163 A. 212 (Appellant's Brief, p. 20); *Lindsay* v. *Glen Alden Coal Co.*, 318 Pa. 133, 177 A. 751 (Appellant's Brief, p. 21); *Noonan* v. *Penn. R.*, 194 A. 282 (Appellant's Brief, p. 21).

Appellant can, therefore, rely on but a single Pennsylvania decision, clearly contrary to the weight and reasoning of other Pennsylvania decisions.

This Court has repeatedly held that, even where local questions of law are involved and Federal Courts would otherwise be under a duty, pursuant to the general rule, to follow State decisions, no such duty exists where there is but a single State decision expressing the State law or where the State law is unsettled.

The reasoning of these cases is that a single decision, particularly when recently made, is insufficient to establish a rule of property or action in a State. The same is true where State law is unsettled. The danger of disturbing vested rights and long-continued action in reliance thereon does not exist under such circumstances and, therefore, Federal Courts may follow their own independent judgment.

tiff in those cases to the train.* But, in doing so, appellant overlooks the point. If plaintiff had been struck by the side of the train, such discussions might be relevant. Plaintiff, however, was struck by an unusual and undesigned projection protruding from the side of the train, as were the plaintiffs in all the cases cited by the Circuit Court of Appeals.

Though a plaintiff may assume one danger, he is not barred from recovery if injured due to a danger created by defendant which he does not assume or expect.†

The case of *St. Louis Southwestern Ry.* v. *Balthrof*, 167 S. W. 246 (Tex.), is particularly relevant and is set forth here at length. In that case appellee's wife was injured on a longitudinal pathway which ran parallel to defendant's tracks at a distance of 3 feet. There was a nearer and safer way than the path chosen by appellee's wife. When several cars had passed her, and as she was proceeding on her way with a bucket of milk in her hand, she was struck a "blasting lick," as she puts it, on the right side, the one next the train, by some object from the cars. She testified she was making her way carefully without excitement, as she had done many times before, and did not know what struck her before losing consciousness. A piece of scantling, used in packing freight, was found near her. In affirming a verdict for plaintiff, the Court held (p. 249):

> "It may be conceded that one of the inherent risks or dangers of the use of the pathway appellee's wife

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* The cases cited were (*Sullivan* v. *Vicksburg, S. & P. R. Co.*, 39 La. Ann. 800, 2 So. 586) where the plaintiff was within fourteen inches of a moving train; (*Texas & Pacific* v. *Green*, 291 S. W. 929, aff'd 299 S. W. 639) where plaintiff was about two or three feet from a moving train; (*Chesapeake & O. R.* v. *Davis*, 22 Ky. L. Rep. 748, 58 S. W. 698) where plaintiff was about two and a half feet to three feet from a moving train; (*Pruitt* v. *Sou. R.*, 167 N. C. 246, 83 S. E. 350) where plaintiff was three or four feet from a moving train; (*Schultz* v. *Erie R.*, 46 Fed. [2d] 485) where plaintiff was within five feet from a moving train. In the second and fourth cases cited in this footnote it was dark when the accident occurred.

† *American Inst. Restatement Law of Torts*, Sec. 468; *Smithwick* v. *Hall & Upson*, 59 Conn. 261, 21 Atl. 924; *Passenger Ry. Co.* v. *Boudrou*, 92 Pa. 475, 37 Am. Rep. 707; *Webster* v. *Rome etc. Ry. Co.*, 115 N. Y. 112, 21 N. E. 725; *N. Y., L. E. etc. Ry. Co.* v. *Ball*, 53 N. J. L. 283, 21 Atl. 725; *Wagner* v. *Mo. & Pac. Ry. Co.*, 97 Mo. 512, 10 S. W. 486; *Berry* v. *Sugar Notch Borough*, 191 Pa. 345, 43 Atl. 240; *Sullivan* v. *Vicksburg S. & P. R. Co.*, 39 La. Ann. 800, 2 So. 586.

was using was that trains would pass in close proximity to the traveler, and that conceivable dangers and risks were imminent, but it is not at all inconsistent with such probability to say that the rule none the less contemplates the exercise of ordinary care to prevent the occurrence shown under the facts in the present case and as is illustrated in St. Louis S. W. Ry. Co. of Tex. v. Wilcox, where we sustained the finding of the jury that appellant had not exercised ordinary care when it so loaded cross ties on one of its cars that one protruded from the car and struck and injured appellee, a licensee upon the company's right of way. Accordingly we conclude that appellee's wife was not guilty of contributory negligence, since her injuries did not result from the inherent or usual and ordinary dangers of the pathway she was travelling but from the active negligence of appellant, independent of any contributing cause afforded either by the pathway, the tracks it paralleled, or the train which ran over the tracks, or appellee's wife."

The Circuit Court of Appeals was aided in reaching its conclusion that the issue of plaintiff's negligence was properly left to the jury by similar reasoning when it stated (p. 396):

"* * * But we cannot say that this particular danger was likely, in view of the testimony of the train checkers that seldom if ever had they known a door to swing open. Nor can we say, in view of the cases, that the possibility of being hit by some unusual object projecting from the side of a train is one that ought to be foreseen and enough to charge the plaintiff with contributory negligence as a matter of law, if he remains within reach of it."

And further (at p. 397):

"He (plaintiff) is not, however, obliged to anticipate unusual projections from the side of the cars and from the jury's verdict we must take it that he was injured by a projecting door. We do not think it was error to leave the issue of contributory negligence to the jury."

Appellant criticizes the following statement in the opinion of the Circuit Court of Appeals (p. 396):

> "To us it would seem imprudent to walk or even stand in the dark within a foot of a train moving at 10 miles an hour; but the fact that recoveries have been allowed under closely similar circumstances in the cases above cited *indicates that fair minded men may hold a different view. This is enough to preclude taking the issue from the jury.*" (Citing cases.) (Writer's emphasis.)

The italicized portions clearly indicate that the Circuit Court of Appeals applied the correct test as recognized by this Court (*Texas & Pacific Ry. Co.* v. *Harvey*, 228 U. S. 319).

Petitioner raises the objection that the Circuit Court of Appeals should not have looked to the decisions of other Courts in order to determine whether this plaintiff was guilty of contributory negligence. Unless we are to assume that other verdicts were not rendered by fair-minded men and passed upon by fair-minded jurists, and unless we are to abolish the entire system of precedent upon which our judicial foundation is constructed, the petitioner's argument is untenable.

The American Law Institute Restatement of the Law of Torts, at Section 285, Topic 3, recognizes that the conduct of a plaintiff may be defined by a decision, or series of decisions, in closely similar cases and that such decisions are controlling.

It will be noted that the portion of the opinion of the Circuit Court of Appeals which is criticized by the appellant was not the sole basis for that Court's conclusion, that the issue of plaintiff's negligence was properly left for the jury. Appellant's criticism, therefore, is purely verbal.

CONCLUSION.

The judgment should be affirmed.

Respectfully submitted,

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ERRATUM

In *Taylor* v. *Del. etc. Canal Co.*, 113 Pa. 162, 8 A. 43, cited herein at page 20, the facts are correctly stated. The holding is likewise correctly represented but through inadvertence a quotation from argument of counsel, rather than from the opinion, is set forth. A portion of the opinion which in substance is the same as the erroneous quotation is as follows (p. 175):

> "* * * and where it is shown, as was done in this case, that the footpath across the company's land had been habitually used by the public for many years without objection, it is for the jury to say whether the company had not acquiesced in such use.
>
> "While such use does not convert the company's right of way into a public highway, it certainly does relieve persons passing on the same from being treated as trespassers on the company's premises; and there is a manifest distinction between the degree of care which a railroad company is bound to exercise toward mere trespassers and those who may be using the right of way by tacit or implied permission of the company.
>
> "In the case of such long continued use by the public, the company and its employees are charged with notice of the fact, and therefore cannot with impunity neglect precautions to prevent dangers to persons thus using the same."

SUPREME COURT OF THE UNITED STATES.

No. 367.—October Term, 1937.

Erie Railroad Company, Petitioner, *vs.* Harry J. Tompkins.	On Certiorari to the United States Circuit Court of Appeals for the Second Circuit.

[April 25, 1938.]

Mr. Justice Brandeis delivered the opinion of the Court.

The question for decision is whether the oft-challenged doctrine of *Swift* v. *Tyson*[1] shall now be disapproved.

Tompkins, a citizen of Pennsylvania, was injured on a dark night by a passing freight train of the Erie Railroad Company while walking along its right of way at Hughestown in that State. He claimed that the accident occurred through negligence in the operation, or maintenance, of the train; that he was rightfully on the premises as licensee because on a commonly used beaten foot-path which ran for a short distance alongside the tracks; and that he was struck by something which looked like a door projecting from one of the moving cars. To enforce that claim he brought an action in the federal court for southern New York, which had jurisdiction because the company is a corporation of that State. It denied liability; and the case was tried by a jury.

The Erie insisted that its duty to Tompkins was no greater than that owed to a trespasser. It contended, among other things, that its duty to Tompkins, and hence its liability, should be determined

[1] 16 Pet. 1 (1842). Leading cases applying the doctrine are collected in Black & White Taxicab, etc. Co. v. Brown & Yellow Taxicab, etc. Co., 276 U. S. 518, 530, 531. Dissent from its application or extension was expressed as early as 1845 by Mr. Justice McKinley (and Mr. Chief Justice Taney) in Lane v. Vick, 3 How. 464, 477. Dissenting opinions were also written by Mr. Justice Daniel in Rowan v. Runnels, 5 How. 134, 140; by Mr. Justice Nelson in Williamson v. Berry, 8 How. 495, 550, 558; by Mr. Justice Campbell in Pease v. Peck, 18 How. 595, 599, 600; and by Mr. Justice Miller in Gelpcke v. City of Dubuque, 1 Wall. 175, 207, and Butz v. City of Muscatine, 8 Wall. 575, 585. Vigorous attack upon the entire doctrine was made by Mr. Justice Field in Baltimore & Ohio R. R. v. Baugh, 149 U. S. 368, 390, and by Mr. Justice Holmes in Kuhn v. Fairmont Coal Co., 215 U. S. 349, 370, and in the Taxicab case, 276 U. S. at 532.

in accordance with the Pennsylvania law; that under the law of Pennsylvania, as declared by its highest court, persons who use pathways along the railroad right of way—that is a longitudinal pathway as distinguished from a crossing—are to be deemed trespassers; and that the railroad is not liable for injuries to undiscovered trespassers resulting from its negligence, unless it be wanton or wilful. Tompkins denied that any such rule had been established by the decisions of the Pennsylvania courts; and contended that, since there was no statute of the State on the subject, the railroad's duty and liability is to be determined in federal courts as a matter of general law.

The trial judge refused to rule that the applicable law precluded recovery. The jury brought in a verdict of $30,000; and the judgment entered thereon was affirmed by the Circuit Court of Appeals, which held (90 F. (2d) 603, 604) that it was unnecessary to consider whether the law of Pennsylvania was as contended, because the question was one not of local, but of general, law and that

"upon questions of general law the federal courts are free, in the absence of a local statute, to exercise their independent judgment as to what the law is; and it is well settled that the question of the responsibility of a railroad for injuries caused by its servants is one of general law. . . . Where the public has made open and notorious use of a railroad right of way for a long period of time and without objection, the company owes to persons on such permissive pathway a duty of care in the operation of its trains. . . . It is likewise generally recognized law that a jury may find that negligence exists toward a pedestrian using a permissive path on the railroad right of way if he is hit by some object projecting from the side of the train."

The Erie had contended that application of the Pennsylvania rule was required, among other things, by Section 34 of the Federal Judiciary Act of September 24, 1789, c. 20, 28 U. S. C. Sec. 725, which provides:

"The laws of the several States, except where the Constitution, treaties, or statutes of the United States otherwise require or provide, shall be regarded as rules of decision in trials at common law, in the courts of the United States, in cases where they apply."

Because of the importance of the question whether the federal court was free to disregard the alleged rule of the Pennsylvania common law, we granted certiorari. 302 U. S. —.

First. *Swift* v. *Tyson*, 16 Pet. 1, 18, held that federal courts exercising jurisdiction on the ground of diversity of citizenship need not, in matters of general jurisprudence, apply the unwritten law of the State as declared by its highest court; that they are free to exercise an independent judgment as to what the common law of the State is—or should be; and that, as there stated by Mr. Justice Story:

"the true interpretation of the thirty-fourth section limited its application to state laws strictly local, that is to say, to the positive statutes of the state, and the construction thereof adopted by the local tribunals, and to rights and titles to things having a permanent locality, such as the rights and titles to real estate, and other matters immovable and intraterritorial in their nature and character. It never has been supposed by us, that the section did apply, or was intended to apply, to questions of a more general nature, not at all dependent upon local statutes or local usages of a fixed and permanent operation, as, for example, to the construction of ordinary contracts or other written instruments, and especially to questions of general commercial law, where the state tribunals are called upon to perform the like functions as ourselves, that is, to ascertain upon general reasoning and legal analogies, what is the true exposition of the contract or instrument, or what is the just rule furnished by the principles of commercial law to govern the case."

The Court in applying the rule of Section 34 to equity cases, in *Mason* v. *United States*, 260 U. S. 545, 559, said: "The statute, however, is merely declarative of the rule which would exist in the absence of the statute."[2] The federal courts assumed, in the broad field of "general law", the power to declare rules of decision which Congress was confessedly without power to enact as statutes. Doubt was repeatedly expressed as to the correctness of the construction given Section 34,[3] and as to the soundness of the rule which it intro-

[2] In Hawkins v. Barney's Lessee, 5 Pet. 457, 464, it was stated that § 34 "has been uniformly held to be no more than a declaration of what the law would have been without it: to wit, that the lex loci must be the governing rule of private right, under whatever jurisdiction private right comes to be examined." See also Bank of Hamilton v. Dudley's Lessee, 2 Pet. 492, 525. Compare Jackson v. Chew, 12 Wheat. 153, 162, 168; Livingston v. Moore, 7 Pet. 469, 542.

[3] Pepper, The Border Land of Federal and State Decisions (1889) 57; Gray, The Nature and Sources of Law (1909 ed.) §§ 533-34; Trickett, Non-Federal Law Administered in Federal Courts (1906) 40 Am. L. Rev. 819, 821-24.

SUPREME COURT OF THE UNITED STATES.

No. 367.—October Term, 1937.

Erie Railroad Company, Petitioner, vs. Harry J. Tompkins. | On Writ of Certiorari to the United States Circuit Court of Appeals for the Second Circuit.

[April 25, 1938.]

Mr. Justice Butler.

The case presented by the evidence is a simple one. Plaintiff was severely injured in Pennsylvania. While walking on defendant's right of way along a much-used path at the end of the cross ties of its main track, he came into collision with an open door swinging from the side of a car in a train going in the opposite direction. Having been warned by whistle and headlight, he saw the locomotive approaching and had time and space enough to step aside and so avoid danger. To justify his failure to get out of the way, he says that upon many other occasions he had safely walked there while trains passed.

Invoking jurisdiction on the ground of diversity of citizenship, plaintiff, a citizen and resident of Pennsylvania, brought this suit to recover damages against defendant, a New York corporation, in the federal court for the southern district of that State. The issues were whether negligence of defendant was a proximate cause of his injuries and whether negligence of plaintiff contributed. He claimed that, by hauling the car with the open door, defendant violated a duty to him. The defendant insisted that it violated no duty and that plaintiff's injuries were caused by his own negligence. The jury gave him a verdict on which the trial court entered judgment; the circuit court of appeals affirmed. 90 F. (2d) 603.

Defendant maintained, citing *Falchetti* v. *Pennsylvania R. Co.*, 307 Pa. 203, and *Koontz* v. *B. & O. R. Co.*, 309 Pa. 122, that the only duty owed plaintiff was to refrain from willfully or wantonly injuring him; it argued that the courts of Pennsylvania had so ruled with respect to persons using a customary longitudinal

path, as distinguished from one crossing the track. The plaintiff insisted that the Pennsylvania decisions did not establish the rule for which the defendant contended. Upon that issue the circuit court of appeals said (p. 604): "We need not go into this matter since the defendant concedes that the great weight of authority in other states is to the contrary. This concession is fatal to its contention, for upon questions of general law the federal courts are free, in absence of a local statute, to exercise their independent judgment as to what the law is; and it is well settled that the question of the responsibility of a railroad for injuries caused by its servants is one of general law." Upon that basis the court held the evidence sufficient to sustain a finding that plaintiff's injuries were caused by the negligence of defendant. It also held the question of contributory negligence one for the jury.

Defendant's petition for writ of certiorari presented two questions: Whether its duty toward plaintiff should have been determined in accordance with the law as found by the highest court of Pennsylvania, and whether the evidence conclusively showed plaintiff guilty of contributory negligence. Plaintiff contends that, as always heretofore held by this Court, the issues of negligence and contributory negligence are to be determined by general law against which local decisions may not be held conclusive; that defendant relies on a solitary Pennsylvania case of doubtful applicability and that, even if the decisions of the courts of that State were deemed controlling, the same result would have to be reached.

No constitutional question was suggested or argued below or here. And as a general rule, this Court will not consider any question not raised below and presented by the petition. *Olson* v. *United States*, 292 U. S. 246, 262. *Johnson* v. *Manhattan Ry. Co.*, 289 U. S. 479, 494. *Gunning* v. *Cooley*, 281 U. S. 90, 98. Here it does not decide either of the questions presented but, changing the rule of decision in force since the foundation of the Government, remands the case to be adjudged according to a standard never before deemed permissible.

The opinion just announced states that "the question for decision is whether the oft-challenged doctrine of *Swift* v. *Tyson* [1842, 16 Pet. 1] shall now be disapproved."

That case involved the construction of the Judiciary Act of 1789, § 34: "The laws of the several states, except where the constitution, treaties, or statutes of the United States otherwise require or provide, shall be regarded as rules of decision in trials at common law in the courts of the United States in cases where they apply." Expressing the view of all the members of the Court, Mr. Justice Story said (p. 18): "In the ordinary use of language it will hardly be contended that the decisions of Courts constitute laws. They are, at most, only evidence of what the laws are, and not of themselves laws. They are often re-examined, reversed, and qualified by Courts themselves, whenever they are found to be either defective, or ill-founded, or otherwise incorrect. The laws of a state are more usually understood to mean the rules and enactments promulgated by the legislative authority thereof, or long established local customs having the force of laws. *In all the various cases, which have hitherto come before us for decision, this Court have uniformly supposed,* that the true interpretation of the thirty-fourth section limited its application to state laws strictly local, that is to say, to the positive statutes of the state, and the construction thereof adopted by the local tribunals, and to rights and titles to things having a permanent locality, such as the rights and titles to real estate, and other matters immovable and intraterritorial in their nature and character. *It never has been supposed by us,* that the section did apply, or was designed to apply, to questions of a more general nature, not at all dependent upon local statutes or local usages of a fixed and permanent operation, as, for example, to the construction of ordinary contracts or other written instruments, and especially to questions of general commercial law, where the state tribunals are called upon to perform the like functions as ourselves, that is, to ascertain upon general reasoning and legal analogies, what is the true exposition of the contract or instrument, or what is the just rule furnished by the principles of commercial law to govern the case. ***And we have not now the slightest difficulty in holding,*** **that this section, upon its true intendment and construction, is strictly limited to local statutes and local usages of the character before stated, and does not extend to contracts and other instruments of a commercial nature, the true interpretation and effect whereof are to be sought, not in the decisions of the local tribunals, but in the general principles**

and doctrines of commercial jurisprudence. Undoubtedly, the decisions of the local tribunals upon such subjects are entitled to, and will receive, the most deliberate attention and respect of this Court, but they cannot furnish positive rules, or conclusive authority, by which our own judgments are to be bound up and governed." (Italics added.)

The doctrine of that case has been followed by this Court in an unbroken line of decisions. So far as appears, it was not questioned until more than 50 years later, and then by a single judge.[1] *B. & O. Railroad* v. *Baugh*, 149 U. S. 368, 390. In that case, Mr. Justice Brewer, speaking for the Court, truly said (p. 373): "Whatever differences of opinion may have been expressed, they have not been on the question whether a matter of general law should be settled by the independent judgment of this court, rather than through an adherence to the decisions of the state courts, but upon the other question, whether a given matter is one of local or of general law."

And since that decision, the division of opinion in this Court has been of the same character as it was before. In 1910, Mr. Justice Holmes, speaking for himself and two other Justices, dissented from the holding that a court of the United States was bound to exercise its own independent judgment in the construction of a conveyance made before the state courts had rendered an authoritative decision as to its meaning and effect. *Kuhn* v. *Fairmont Coal Co.*, 215 U. S. 349. But that dissent accepted (p. 371) as "settled" the doctrine of *Swift* v. *Tyson*, and insisted (p. 372) merely that the case under consideration was by nature and necessity peculiarly local.

Thereafter, as before, the doctrine was constantly applied.[2] In *B. & W. Taxi. Co.* v. *B. & Y. Taxi. Co.*, 276 U. S. 518, three judges

[1] Mr. Justice Field filed a dissenting opinion, several sentences of which are quoted in the decision just announced. The dissent failed to impress any of his associates. It assumes that adherence to § 34 as construed involves a supervision over legislative or judicial action of the states. There is no foundation for that suggestion. Clearly the dissent of the learned Justice rests upon misapprehension of the rule. He joined in applying the doctrine for more than a quarter of a century before his dissent. The reports do not disclose that he objected to it in any later case. Cf. Oakes v. Mase, 165 U. S. 363.

[2] In Salem Co. v. Manufacturers' Co., 264 U. S. 182, Mr. Justice Holmes and Mr. Justice Brandeis concurred (p. 200) in the judgment of the Court upon a question of general law on the ground that the rights of the parties were governed by state law.

dissented. The writer of the dissent, Mr. Justice Holmes, said, however (p. 535): "I should leave *Swift* v. *Tyson* undisturbed, as I indicated in *Kuhn* v. *Fairmont Coal Co.*, but I would not allow it to spread the assumed dominion into new fields."

No more unqualified application of the doctrine can be found than in decisions of this Court speaking through Mr. Justice Holmes. *United Zinc Co.* v. *Britt*, 258 U. S. 268. *B. & O. R. R.* v. *Goodman*, 275 U. S. 66, 70. Without in the slightest departing from that doctrine, but implicitly applying it, the strictness of the rule laid down in the *Goodman* case was somewhat ameliorated by *Pokora* v. *Wabash Ry. Co.*, 292 U. S. 98.

Whenever possible, consistently with standards sustained by reason and authority constituting the general law, this Court has followed applicable decisions of state courts. *Mutual Life Co.* v. *Johnson*, 293 U. S. 335, 339. See *Burgess* v. *Seligman*, 107 U. S. 20, 34. *B. & W. Taxi Co.* v. *B. & Y. Taxi Co.*, *supra*, 530. Unquestionably the determination of the issues of negligence and contributory negligence upon which decision of this case depends are questions of general law. *Hough* v. *Railway Co.*, 100 U. S. 213, 226. *Lake Shore, &c. Railway Co.* v. *Prentice*, 147 U. S. 101. *B. & O. Railroad* v. *Baugh*, *supra*. *Gardner* v. *Michigan Central Railroad*, 150 U. S. 349, 358. *Central Vermont Ry.* v. *White*, 238 U. S. 507, 512. *B. & O. R. R.* v. *Goodman*, *supra*. *Pokora* v. *Wabash Ry. Co.*, *supra*.

While amendments to § 34 have from time to time been suggested, the section stands as originally enacted. Evidently Congress has intended throughout the years that the rule of decision as construed should continue to govern federal courts in trials at common law. The opinion just announced suggests that Mr. Warren's research has established that from the beginning this Court has erroneously construed § 34. But that author's "New Light on the History of the Federal Judiciary Act of 1789" does not purport to be authoritative and was intended to be no more than suggestive. The weight to be given to his discovery has never been discussed at this bar. Nor does the opinion indicate the ground disclosed by the research. In his dissenting opinion in the *Taxicab* case, Mr. Justice Holmes referred to Mr. Warren's work but failed to persuade the Court that "laws" as used in § 34 included varying and possibly ill-considered rulings by the courts of a State on ques-

duced.[4] But it was the more recent research of a competent scholar, who examined the original document, which established that the construction given to it by the Court was erroneous; and that the purpose of the section was merely to make certain that, in all matters except those in which some federal law is controlling, the federal courts exercising jurisdiction in diversity of citizenship cases would apply as their rules of decision the law of the State, unwritten as well as written.[5]

Criticism of the doctrine became widespread after the decision of *Black and White Taxicab & Transfer Co.* v. *Brown and Yellow Taxicab & Transfer Co.*, 276 U. S. 518.[6] There, Brown and Yellow, a Kentucky corporation owned by Kentuckians, and the Louisville and Nashville Railroad, also a Kentucky corporation, wished that the former should have the exclusive privilege of soliciting passenger and baggage transportation at the Bowling Green, Kentucky, railroad station; and that the Black and White, a competing Kentucky corporation, should be prevented from interfering with that privilege. Knowing that such a contract would be void under the common law of Kentucky, it was arranged that the Brown and Yellow reincorporate under the law of Tennessee, and that the contract with the railroad should be executed there. The suit was then brought by the Tennessee corporation in the federal court for western Kentucky to enjoin competition by the Black and White; an injunction issued by the district court was sustained by the

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[4] Street, Is There a General Commercial Law of the United States (1873) 21 Am. L. Reg. 473; Hornblower, Conflict between State and Federal Decisions (1880) 14 Am. L. Rev. 211; Meigs, Decisions of the Federal Courts on Questions of State Law (1882) 8 So. L. Rev. (n. s.) 452, (1911) 45 Am. L. Rev. 47; Heiskell, Conflict between Federal and State Decisions (1882) 16 Am. L. Rev. 743; Rand, Swift *v.* Tyson versus Gelpcke *v.* Dubuque (1895) 8 Harv. L. Rev. 328, 341-43; Mills, Should Federal Courts Ignore State Laws (1900) 34 Am. L. Rev. 51; Carpenter, Court Decisions and the Common Law (1917) 17 Col. L. Rev. 593, 602-03.

[5] Charles Warren, New Light on the History of the Federal Judiciary Act of 1789 (1923) 37 Harv. L. Rev. 49, 51-52, 81-88, 108.

[6] Shelton, Concurrent Jurisdiction—Its Necessity and its Dangers (1928) 15 Va. L. Rev. 137; Frankfurter, Distribution of Judicial Power Between Federal and State Courts (1928) 13 Corn. L. Q. 499, 524-30; Johnson, State Law and the Federal Courts (1929) 17 Ky. L. J. 355; Fordham, The Federal Courts and the Construction of Uniform State Laws (1929) 7 N. C. L. Rev. 423; Dobie, Seven Implications of Swift *v.* Tyson (1930) 16 Va. L. Rev. 225; Dawson, Conflict of Decisions between State and Federal Courts in Kentucky, and the Remedy (1931) 20 Ky. L. J. 1; Campbell, Is Swift *v.* Tyson an Argument for or against Abolishing Diversity of Citizenship Jurisdiction (1932) 18 A. B. A. J. 809; Ball, Revision of Federal Diversity Jurisdiction (1933) 28 Ill. L. Rev. 356, 362-64; Fordham, Swift *v.* Tyson and the Construction of State Statutes (1935) 41 W. Va. L. Q. 131.

Court of Appeals; and this Court, citing many decisions in which the doctrine of *Swift* v. *Tyson* had been applied, affirmed the decree.

Second. Experience in applying the doctrine of *Swift* v. *Tyson*, had revealed its defects, political and social; and the benefits expected to flow from the rule did not accrue. Persistence of state courts in their own opinions on questions of common law prevented uniformity;[7] and the impossibility of discovering a satisfactory line of demarcation between the province of general law and that of local law developed a new well of uncertainties.[8]

On the other hand, the mischievous results of the doctrine had become apparent. Diversity of citizenship jurisdiction was conferred in order to prevent apprehended discrimination in state courts against those not citizens of the State. *Swift* v. *Tyson* introduced grave discrimination by non-citizens against citizens. It made rights enjoyed under the unwritten "general law" vary according to whether enforcement was sought in the state or in the federal court; and the privilege of selecting the court in which the right should be determined was conferred upon the non-citizen.[9] Thus, the doctrine rendered impossible equal protection of the law. In attempting to promote uniformity of law throughout the United States, the doctrine had prevented uniformity in the administration of the law of the State.

The discrimination resulting became in practice far-reaching. This resulted in part from the broad province accorded to the so-

[7] Compare Mr. Justice Miller in Gelpcke *v.* City of Dubuque, 1 Wall. 175, 209. The conflicts listed in Holt, The Concurrent Jurisdiction of the Federal and State Courts (1888) 160 *et seq.* cover twenty-eight pages. See also Frankfurter, *supra* note 6, at 524-30; Dawson, *supra* note 6; Note, Aftermath of the Supreme Court's Stop, Look and Listen Rule (1930) 43 Harv. L. Rev. 926; cf. Yntema and Jaffin, Preliminary Analysis of Concurrent Jurisdiction (1931) 79 U. of Pa. L. Rev. 869, 881-86. Moreover, as pointed out by Judge Augustus N. Hand in Cole *v.* Pennsylvania R. Co., 43 F. (2d) 953, 956-57, decisions of this Court on common law questions are less likely than formerly to promote uniformity.

[8] Compare 2 Warren, The Supreme Court in United States History (rev. ed. 1935) 89: "Probably no decision of the Court has ever given rise to more uncertainty as to legal rights; and though doubtless intended to promote uniformity in the operation of business transactions, its chief effect has been to render it difficult for business men to know in advance to what particular topic the Court would apply the doctrine. . . ." The Federal Digest, through the 1937 volume, lists nearly 1000 decisions involving the distinction between questions of general and of local law.

[9] It was even possible for a non-resident plaintiff defeated on a point of law in the highest court of a State nevertheless to win out by taking a nonsuit and renewing the controversy in the federal court. Compare Gardner *v.* Michigan Cent. R. R., 150 U. S. 349; Harrison *v.* Foley, 206 Fed. 57 (C. C. A. 5); Interstate Realty & Inv. Co *v.* Bibb County, 293 Fed. 721 (C. C. A. 5); see Mills, *supra* note 4, at 52.

called "general law" as to which federal courts exercised an independent judgment.[10] In addition to questions of purely commercial law, "general law" was held to include the obligations under contracts entered into and to be performed within the State,[11] the extent to which a carrier operating within a State may stipulate for exemption from liability for his own negligence or that of his employee;[12] the liability for torts committed within the State upon persons resident or property located there, even where the question of liability depended upon the scope of a property right conferred by the State;[13] and the right to exemplary or punitive damages.[14] Furthermore, state decisions construing local deeds,[15] mineral conveyances,[16] and even devises of real estate[17] were disregarded.[18]

In part the discrimination resulted from the wide range of persons held entitled to avail themselves of the federal rule by resort to the diversity of citizenship jurisdiction. Through this juris-

[10] For a recent survey of the scope of the doctrine, see Sharp & Brennan, The Application of the Doctrine of Swift v. Tyson since 1900 (1929) 4 Ind. L. J. 367.

[11] Black and White Taxicab & Transfer Co. v. Brown and Yellow Taxicab & Transfer Co., 276 U. S. 518; Rowan v. Runnels, 5 How. 134, 139; Boyce v. Tabb, 18 Wall. 546, 548; Johnson v. Chas. D. Norton Co., 159 Fed. 361 (C. C. A. 6); Keene Five Cent Sav. Bank v. Reid, 123 Fed. 221 (C. C. A. 8).

[12] Railroad Co. v. Lockwood, 17 Wall. 357, 367-68; Liverpool & G. W. Steam Co. v. Phenix Ins. Co., 129 U. S. 397, 443; Eels v. St. Louis, K. & N. W. Ry., 52 Fed. 903 (C. C. S. D. Iowa); Fowler v. Pennsylvania R. R., 229 Fed. 373 (C. C. A. 2).

[13] Chicago City v. Robbins, 2 Black 418, 428. Compare Yates v. Milwaukee, 10 Wall. 497, 506-07; Yeates v. Illinois Cent. Ry., 137 Fed. 943 (C. C. N. D. Ill.); Curtis v. Cleveland, C. C. & St. L. Ry., 140 Fed. 777 (C. C. E. D. Ill.). See also Hough v. Railway Co., 100 U. S. 213, 226; Baltimore & Ohio R. R. v. Baugh, 149 U. S. 368; Gardner v. Michigan Cent. R. R., 150 U. S. 349, 358; Beutler v. Grand Trunk Junction Ry., 224 U. S. 85; Baltimore & Ohio R. R. v. Goodman, 275 U. S. 66; Pokora v. Wabash Ry., 292 U. S. 98; Cole v. Pennsylvania R. R., 43 F. (2d) 953 (C. C. A. 2).

[14] Lake Shore & M. S. Ry. v. Prentice, 147 U. S. 101, 106; Norfolk & P. Traction Co. v. Miller, 174 Fed. 607 (C. C. A. 4); Greene v. Keithley, 86 F. (2d) 239 (C. C. A. 8).

[15] Foxcroft v. Mallet, 4 How. 353, 379; Midland Valley Ry. v. Sutter, 28 F. (2d) 163 (C. C. A. 8); Midland Valley Ry. v. Jarvis, 29 F. (2d) 539 (C. C. A. 8).

[16] Kuhn v. Fairmont Coal Co., 215 U. S. 349; Mid-Continent Petroleum Corp. v. Sauder, 67 F. (2d) 9, 12 (C. C. A. 10), reversed on other grounds, 292 U. S. 272.

[17] Lane v. Vick, 3 How. 464, 476; Barber v. Pittsburgh, F. W. & C. Ry., 166 U. S. 83, 99-100; Messinger v. Anderson, 171 Fed. 785, 791-792 (C. C. A. 6), reversed on other grounds, 225 U. S. 436; Knox & Lewis v. Alwood, 228 Fed. 753 (S. D. Ga.).

[18] Compare, also, Williamson v. Berry, 8 How. 495; Watson v. Tarpley, 18 How. 517; Gelpcke v. City of Dubuque, 1 Wall. 175.

diction individual citizens willing to remove from their own State and become citizens of another might avail themselves of the federal rule.[19] And, without even change of residence, a corporate citizen of the State could avail itself of the federal rule by re-incorporating under the laws of another state, as was done in the *Taxicab* case.

The injustice and confusion incident to the doctrine of *Swift* v. *Tyson* have been repeatedly urged as reasons for abolishing or limiting diversity of citizenship jurisdiction.[20] Other legislative relief has been proposed.[21] If only a question of statutory construction were involved, we should not be prepared to abandon a doctrine so widely applied throughout nearly a century.[22] But the unconstitutionality of the course pursued has now been made clear and compels us to do so.

Third. Except in matters governed by the Federal Constitution or by Acts of Congress, the law to be applied in any case is the law of the State. And whether the law of the State shall be declared by its Legislature in a statute or by its highest court in a

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[19] See Chesver v. Wilson, 9 Wall. 108, 123; Robertson v. Carson, 19 Wall. 94, 106-07; Morris v. Gilmer, 129 U. S. 315, 328; Dickerman v. Northern Trust Co., 176 U. S. 181, 192; Williamson v. Osenton, 232 U. S. 619, 625.

[20] See, e. g., Hearings Before a Subcommittee of the Senate Committee on the Judiciary on S. 937, S. 939, and S. 3243, 72d Cong., 1st Sess. (1932) 6-8; Hearing Before the House Committee on the Judiciary on H. R. 10594, H. R. 4526, and H. R. 11508, 72d Cong., 1st Sess., ser. 12 (1932) 97-104; Sen. Rep. No. 530, 72d Cong., 1st Sess. (1932) 4-6; Collier, A Plea Against Jurisdiction Because of Diversity (1913) 76 Cent. L. J. 263, 264, 266; Frankfurter, *supra* note 6; Ball, *supra* note 6; Warren, Corporations and Diversity of Citizenship (1933) 19 Va. L. Rev. 661, 686.

[21] Thus, bills which would abrogate the doctrine of Swift v. Tyson have been introduced. S. 4333, 70th Cong., 1st Sess.; S. 96, 71st Cong., 1st Sess.; H. R. 8094, 72d Cong., 1st Sess. See also Mills, *supra* note 4, at 68-69; Dobie, *supra* note 6, at 241; Frankfurter, *supra* note 6, at 530; Campbell, *supra* note 6, at 811. State statutes on conflicting questions of "general law" have also been suggested. See Heiskell, *supra* note 4, at 760; Dawson, *supra* note 6; Dobie, *supra* note 6, at 241.

[22] The doctrine has not been without defenders. See Eliot, The Common Law of the Federal Courts (1902) 36 Am. L. Rev. 498, 523-25; A. B. Parker, The Common Law Jurisdiction of the United States Courts (1907) 17 Yale L. J. 1; Schofield, Swift v. Tyson; Uniformity of Judge-Made State Law in State and Federal Courts (1910) 4 Ill. L. Rev. 533; Brown, The Jurisdiction of the Federal Courts Based on Diversity of Citizenship (1929) 78 U. of Pa. L. Rev. 179, 189-91; J. J. Parker, The Federal Jurisdiction and Recent Attacks Upon It (1932) 18 A. B. A. J. 433, 438; Yntema, The Jurisdiction of the Federal Courts in Controversies Between Citizens of Different States (1933) 19 A. B. A. J. 71, 74-75; Beutel, Common Law Judicial Technique and the Law of Negotiable Instruments—Two Unfortunate Decisions (1934) 9 Tulane L. Rev. 64.

decision is not a matter of federal concern. There is no federal general common law. Congress has no power to declare substantive rules of common law applicable in a State whether they be local in their nature or "general", be they commercial law or a part of the law of torts. And no clause in the Constitution purports to confer such a power upon the federal courts. As stated by Mr. Justice Field when protesting in *Baltimore & Ohio R. R.* v. *Baugh*, 149 U. S. 368, 401, against ignoring the Ohio common law of fellow servant liability:

"I am aware that what has been termed the general law of the country—which is often little less than what the judge advancing the doctrine thinks at the time should be the general law on a particular subject—has been often advanced in judicial opinions of this court to control a conflicting law of a State. I admit that learned judges have fallen into the habit of repeating this doctrine as a convenient mode of brushing aside the law of a State in conflict with their views. And I confess that, moved and governed by the authority of the great names of those judges, I have, myself, in many instances, unhesitatingly and confidently, but I think now erroneously, repeated the same doctrine. But, notwithstanding the great names which may be cited in favor of the doctrine, and notwithstanding the frequency with which the doctrine has been reiterated, there stands, as a perpetual protest against its repetition, the Constitution of the United States, which recognizes and preserves the autonomy and independence of the States—independence in their legislative and independence in their judicial departments. Supervision over either the legislative or the judicial action of the States is in no case permissible except as to matters by the Constitution specifically authorized or delegated to the United States. Any interference with either, except as thus permitted, is an invasion of the authority of the State and, to that extent, a denial of its independence."

The fallacy underlying the rule declared in *Swift* v. *Tyson* is made clear by Mr. Justice Holmes.[22] The doctrine rests upon the assumption that there is "a transcendental body of law outside of any particular State but obligatory within it unless and until changed by statute", that federal courts have the power to use their judgment as to what the rules of common law are; and that in the federal courts "the parties are entitled to an independent judgment on matters of general law":

"but law in the sense in which courts speak of it today does not exist without some definite authority behind it. The common law

[22] Kuhn v. Fairmont Coal Co., 215 U. S. 349, 370-372; Black & White Taxicab, etc. Co. v. Brown & Yellow Taxicab, etc. Co., 276 U. S. 518, 532-36.

so far as it is enforced in a State, whether called common law or not, is not the common law generally but the law of that State existing by the authority of that State without regard to what it may have been in England or anywhere else. . . .
"the authority and only authority is the State, and if that be so, the voice adopted by the State as its own [whether it be of its Legislature or of its Supreme Court] should utter the last word."
Thus the doctrine of *Swift* v. *Tyson* is, as Mr. Justice Holmes said, "an unconstitutional assumption of powers by courts of the United States which no lapse of time or respectable array of opinion should make us hesitate to correct." In disapproving that doctrine we do not hold unconstitutional Section 34 of the Federal Judiciary Act of 1789 or any other Act of Congress. We merely declare that in applying the doctrine this Court and the lower courts have invaded rights which in our opinion are reserved by the Constitution to the several States.

Fourth. The defendant contended that by the common law of Pennslyvania as declared by its highest court in *Falchetti* v. *Pennsylvania R. Co.*, 307 Pa. 203, the only duty owed to the plaintiff was to refrain from wilful or wanton injury. The plaintiff denied that such is the Pennsylvania law.[24] In support of their respective contentions the parties discussed and cited many decisions of the Supreme Court of the State. The Circuit Court of Appeals ruled that the question of liability is one of general law; and on that ground declined to decide the issue of state law. As we hold this was error, the judgment is reversed and the case remanded to it for further proceedings in conformity with our opinion.

Reversed.

Mr. Justice CARDOZO took no part in the consideration or decision of this case.

A true copy.

Test:

Clerk, Supreme Court, U. S.

[24] Tompkins also contended that the alleged rule of the Falchetti case is not in any event applicable here because he was struck at the intersection of the longitudinal pathway and a transverse crossing. The court below found it unnecessary to consider this contention, and we leave the question open.

supposed omission of Congress to legislate as to the effect of decisions leaves federal courts free to interpret general law for themselves. I am not at all sure whether, in the absence of federal statutory direction, federal courts would be compelled to follow state decisions. There was sufficient doubt about the matter in 1789 to induce the first Congress to legislate. No former opinions of this Court have passed upon it. Mr. Justice Holmes evidently saw nothing "unconstitutional" which required the overruling of *Swift* v. *Tyson*, for he said in the very opinion quoted by the majority, "I should leave *Swift* v. *Tyson* undisturbed, as I indicated in *Kuhn* v. *Fairmont Coal Co.*, but I would not allow it to spread the assumed dominion into new fields." *B. & W. Taxi Co.* v. *B. & Y. Taxi Co.*, 276 U. S. 518, 535. If the opinion commits this Court to the position that the Congress is without power to declare what rules of substantive law shall govern the federal courts, that conclusion also seems questionable. The line between procedural and substantive law is hazy but no one doubts federal power over procedure. *Wayman* v. *Southard*, 10 Wheat. 1. The Judiciary Article and the "necessary and proper" clause of Article One may fully authorize legislation, such as this section of the Judiciary Act.

In this Court, *stare decisis*, in statutory construction, is a useful rule, not an inexorable command. *Burnet* v. *Coronado Oil & Gas Co.*, 285 U. S. 393, dissent, p. 406, note 1. Compare *Read* v. *Bishop of Lincoln*, 1892 A. C. 644, 655; *London Street Tramways* v. *London County Council*, 1898 A. C. 375, 379. It seems preferable to overturn an established construction of an Act of Congress, rather than, in the circumstances of this case, to interpret the Constitution. Cf. *United States* v. *Delaware & Hudson*, 213 U. S. 366.

There is no occasion to discuss further the range or soundness of these few phrases of the opinion. It is sufficient now to call attention to them and express my own non-acquiescence.

tions of common law. See, e. g., *Swift* v. *Tyson*, *supra*, 16-17. It well may be that, if the Court should now call for argument of counsel on the basis of Mr. Warren's research, it would adhere to the construction it has always put upon § 34. Indeed, the opinion in this case so indicates. For it declares: "If only a question of statutory construction were involved we should not be prepared to abandon a doctrine so widely applied throughout a century. But the unconstitutionality of the course pursued has now been made clear and compels us to do so." This means that, so far as concerns the rule of decision now condemned, the Judiciary Act of 1789 passed to establish judicial courts to exert the judicial power of the United States, and especially § 34 of that Act as construed, is unconstitutional; that federal courts are now bound to follow decisions of the courts of the State in which the controversies arise; and that Congress is powerless otherwise to ordain. It is hard to foresee the consequences of the radical change so made. Our opinion in the *Taxicab* case cites numerous decisions of this Court which serve in part to indicate the field from which it is now intended forever to bar the federal courts. It extends to all matters of contracts and torts not positively governed by state enactments. Counsel searching for precedent and reasoning to disclose common-law principles on which to guide clients and conduct litigation are by this decision told that as to all of these questions the decisions of this Court and other federal courts are no longer anywhere authoritative.

This Court has often emphasized its reluctance to consider constitutional questions and that legislation will not be held invalid as repugnant to the fundamental law if the case may be decided upon any other ground. In view of grave consequences liable to result from erroneous exertion of its power to set aside legislation, the Court should move cautiously, seek assistance of counsel, act only after ample deliberation, show that the question is before the Court, that its decision cannot be avoided by construction of the statute assailed or otherwise, indicate precisely the principle or provision of the Constitution held to have been transgressed, and fully disclose the reasons and authorities found to warrant the conclusion of invalidity. These safeguards against the improvident use of the great power to invalidate legislation are so well-grounded and familiar that statement of reasons or citation of authority to sup-

port them is no longer necessary. But see e. g.: *Charles River Bridge* v. *Warren Bridge*, 11 Pet. 420, 553; *Township of Pine Grove* v. *Talcott*, 19 Wall. 666, 673; *Chicago, &c. Railway Co.* v. *Wellman*, 143 U. S. 339, 345; *Baker* v. *Grice*, 169 U. S. 284, 292; *Martin* v. *District of Columbia*, 205 U. S. 135, 140.

So far as appears, no litigant has ever challenged the power of Congress to establish the rule as construed. It has so long endured that its destruction now without appropriate deliberation cannot be justified. There is nothing in the opinion to suggest that consideration of any constitutional question is necessary to a decision of the case. By way of reasoning, it contains nothing that requires the conclusion reached. Admittedly, there is no authority to support that conclusion. Against the protest of those joining in this opinion, the Court declines to assign the case for reargument. It may not justly be assumed that the labor and argument of counsel for the parties would not disclose the right conclusion and aid the Court in the statement of reasons to support it. Indeed, it would have been appropriate to give Congress opportunity to be heard before devesting it of power to prescribe rules of decision to be followed in the courts of the United States. See *Myers* v. *United States*, 272 U. S. 52, 176.

The course pursued by the Court in this case is repugnant to the Act of Congress of August 24, 1937, 50 Stat. 751. It declares: "That whenever the constitutionality of any Act of Congress affecting the public interest is drawn in question in any court of the United States in any suit or proceeding to which the United States, or any agency thereof, or any officer or employee thereof, as such officer or employee, is not a party, the court having jurisdiction of the suit or proceeding shall certify such fact to the Attorney General. In any such case the court shall permit the United States to intervene and become a party for presentation of evidence (if evidence is otherwise receivable in such suit or proceeding) and argument upon the question of the constitutionality of such Act. In any such suit or proceeding the United States shall, subject to the applicable provisions of law, have all the rights of a party and the liabilities of a party as to court costs to the extent necessary for a proper presentation of the facts and law relating to the constitutionality of such Act." That provision extends to this Court. §5. If defend-

ant had applied for and obtained the writ of certiorari upon the claim that, as now held, Congress has no power to prescribe the rule of decision, § 34 as construed, it would have been the duty of this Court to issue the prescribed certificate to the Attorney General in order that the United States might intervene and be heard on the constitutional question. Within the purpose of the statute and its true intent and meaning, the constitutionality of that measure has been "drawn in question". Congress intended to give the United States the right to be heard in every case involving constitutionality of an Act affecting the public interest. In view of the rule that, in the absence of challenge of constitutionality, statutes will not here be invalidated on that ground, the Act of August 24, 1937 extends to cases where constitutionality is first "drawn in question" by the Court. No extraordinary or unusual action by the Court after submission of the cause should be permitted to frustrate the wholesome purpose of that Act. The duty it imposes ought here to be willingly assumed. If it were doubtful whether this case is within the scope of the Act, the Court should give the United States opportunity to intervene and, if so advised, to present argument on the constitutional question, for undoubtedly it is one of great public importance. That would be to construe the Act according to its meaning.

The Court's opinion in its first sentence defines the question to be whether the doctrine of *Swift* v. *Tyson* shall now be disapproved; it recites (third page) that Congress is without power to prescribe rules of decision that have been followed by federal courts as a result of the construction of § 34 in *Swift* v. *Tyson* and since; after discussion, it declares (seventh page) that "the unconstitutionality of the course pursued [meaning the rule of decision resulting from that construction] compels" abandonment of the doctrine so long applied; and then near the end of the last page the Court states that it does not hold § 34 unconstitutional, but merely that, in applying the doctrine of *Swift* v. *Tyson* construing it, this Court and the lower courts have invaded rights which are reserved by the Constitution to the several States. But, plainly through the form of words employed, the substance of the decision appears; it strikes down as unconstitutional § 34 as construed by our decisions; it divests the Congress of power to prescribe rules to be followed by federal courts when deciding ques-

tions of general law. In that broad field it compels this and the lower federal courts to follow decisions of the courts of a particular State.

I am of opinion that the constitutional validity of the rule need not be considered, because under the law, as found by the courts of Pennsylvania and generally throughout the country, it is plain that the evidence required a finding that plaintiff was guilty of negligence that contributed to cause his injuries and that the judgment below should be reversed upon that ground.

Mr. Justice McReynolds concurs in this opinion.

SUPREME COURT OF THE UNITED STATES.

No. 367.—October Term, 1937.

Erie Railroad Company, Petitioner, *vs.* Harry J. Tompkins. } On Certiorari to the United States Circuit Court of Appeals for the Second Circuit.

[April 25, 1938.]

Mr. Justice Reed.

I concur in the conclusion reached in this case, in the disapproval of the doctrine of *Swift* v. *Tyson,* and in the reasoning of the majority opinion except in so far as it relies upon the unconstitutionality of the "course pursued" by the federal courts.

The "doctrine of *Swift* v. *Tyson,*" as I understand it, is that the words "the laws," as used in Section 34, line one, of the Federal Judiciary Act of September 24, 1789, do not include in their meaning "the decisions of the local tribunals." Mr. Justice Story, in deciding that point, said (16 Pet. 19):

"Undoubtedly, the decisions of the local tribunals upon such subjects are entitled to, and will receive, the most deliberate attention and respect of this Court; but they cannot furnish positive rules, or conclusive authority, by which our own judgments are to be bound up and governed."

To decide the case now before us and to "disapprove" the doctrine of *Swift* v. *Tyson* requires only that we say that the words "the laws" include in their meaning the decisions of the local tribunals. As the majority opinion shows, by its reference to Mr. Warren's researches and the first quotation from Mr. Justice Holmes, that this Court is now of the view that "laws" includes "decisions," it is unnecessary to go further and declare that the "course pursued" was "unconstitutional," instead of merely erroneous.

The "unconstitutional" course referred to in the majority opinion is apparently the ruling in *Swift* v. *Tyson* that the